

**United States Bankruptcy Court  
Central District of California  
Northern Division  
Ronald A Clifford III, Presiding  
Courtroom 201 Calendar**

**Tuesday, September 12, 2023**

**Hearing Room      201**

10:00 AM

**9: -**

**Chapter**

**#0.00**

**PLEASE TAKE NOTE:**

**On September 12, 2023, Courtroom 201 in Santa Barbara (Northern Division) will be closed for maintenance. Appearances for matters may be made in-person in Courtroom 5D in the Santa Ana Division (at Ronald Reagan Federal Building and U.S. Courthouse, 411 West Fourth Street, Santa Ana, California 92701).**

Appearances for matters may also be made by video through ZoomGov, or by telephone through ZoomGov. If appearing through ZoomGov, parties in interest and members of the public may connect to the video and audio feeds, free of charge, using the connection information provided below. All persons that choose to appear in person must comply with all applicable Centers for Disease Control and Prevention (CDC) guidelines regarding the wearing of face coverings and physical distancing inside and outside of the courtroom. Parties should not enter the courthouse when feeling unwell, if they have tested positive for COVID-19, or if they fall within the quarantine recommendations after having come into close contact with someone who has COVID 19.

Individuals may participate by ZoomGov video and audio using a personal computer (equipped with camera, microphone and speaker), or a handheld mobile device (such as an iPhone or Android phone). Individuals may opt to participate by audio only using a telephone (standard telephone charges may apply).

Neither a Zoom nor a ZoomGov account is necessary to participate and no pre-registration is required. The audio portion of each hearing will be recorded electronically by the Court and constitutes its official record.

Video/audio web address: <https://cacb.zoomgov.com/j/1616712285>

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Password: **374254**

Telephone conference lines: **1 (669) 254 5252 or 1 (646) 828 7666**

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**Chapter**

**Tentative Ruling:**

- NONE LISTED -

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**9:18-11361    Brian Bruce Davids and Amanda Wood Davids**

**Chapter 13**

**#1.00    CONT'D Hearing**

RE: [54] Notice of motion and motion for relief from the automatic stay with supporting declarations REAL PROPERTY RE: 2641 Santa Ynez Ave, Simi Valley, California 93063 with Proof of Service. (Martinez, Kirsten)

FR. 8-8-23

Docket      54

**\*\*\* VACATED \*\*\*    REASON: Resolved by Stipulation and Order (Entered on 8/25/23).**

**Tentative Ruling:**

**August 8, 2023**

**Appearances are waived. The Court will grant the Motion pursuant to 11 U.S.C. § 362(d)(1) for the reasons set forth *infra*, but will deny the Motion as to its request that the Court waive Fed. R. Bankr. P. 4001(a)(3). Movant to upload a conforming order within 7 days.**

Towd Point Mortgage Trust Asset-Backed Securities, Series 2021-SJ1, U.S. Bank National Association, as Indenture Trustee as serviced by Specialized Loan Servicing LLC ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d) (1) in relation to the real property located at 2641 Santa Ynez Ave., Simi Valley CA 93063 (the "Property") of Brian Bruce Davids and Amanda Wood Davids (the "Debtors") on the grounds that (1) Movant's interest in the Property is not adequately protected, and (2) the Debtors failed to make post-confirmation mortgage payments as they became due under the *Original Chapter 13 Plan* (the "Plan"). See Docket No. 54, *Motion for Relief from Stay Under 11 U.S.C. § 362* (the "Motion"), pp. 3-4.

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property, (2) at its option, offer, provide and enter into a potential forbearance agreement or other loan workout/loss mitigation agreement by contacting the Debtors, (3) waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 4001(a)(3), (4) upon entry of the order, for purposes of Cal. Civ. Code § 2923.5, the Debtors are borrowers as

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**Brian Bruce Davids and Amanda Wood Davids**

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define in Cal. Civ. Code § 2920.5(c)(2)(C), and (5) if relief is not granted, adequate protection be ordered. *See id.* at p. 5.

The Motion was filed on June 30, 2023 and served upon the Debtors via U.S. Mail first class, postage prepaid on the same date. *See Motion, Proof of Service of Document*, p. 14. Pursuant to this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as the case may be." Neither the Debtors, nor any other party served with the Motion has timely filed an opposition to the Motion. The Court therefore takes the default of all non-responding parties, including the Debtors.

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay [] for cause, including the lack of adequate protection of an interest in property of such party in interest." Failure to make postpetition mortgage payments as they become due in a Chapter 13 case may constitute "cause" for relief from the automatic stay under § 362(d)(1). *See In re Marks*, 2012 WL 6554705, at \*11 (9th Cir. BAP Dec. 14, 2012), *aff'd*, 624 F. App'x 963 (9th Cir. 2015) (citing *In re Ellis*, 60 B.R. 432, 435 (9th Cir. BAP 1985)).

Under the terms of the Plan, the Debtors are required to make regular payments to Movant under the terms of the prepetition lending agreement. *See Docket No. 2*, pp. 5-6, Class 2. Movant asserts that the Debtors defaulted on Plan payments consisting of one (1) unpaid post-confirmation payments of \$373.03, one (1) unpaid post-confirmation payments of \$384.83, one (1) unpaid post-confirmation payments of \$389.02, one (1) unpaid post-confirmation payments of \$401.03, two (2) unpaid post-confirmation payments of \$422.77, one (1) unpaid post-confirmation payments of \$415.45, one (1) unpaid post-confirmation payments of \$438.78, and one (1) unpaid post-confirmation payments of \$432.56. *See Motion*, p. 10. Less a suspense account balance of \$365.82, Movant asserts that there is a total post-confirmation delinquency of \$3,314.42 (as of the date of the Motion). *Id.* According to the Motion, the last monthly payment of \$356.63 was received by Movant on January 20, 2023. *Id.*

Cause has been shown sufficient to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) due to the Debtors' failure to make no less than nine (9) postpetition/post-

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confirmation mortgage payments pursuant to the terms of the Plan.

As to Fed. R. Bankr. P. 4001(a)(3), "[t]he purpose of this provision is to permit a short period of time for the debtor or the party opposing relief to seek a stay pending an appeal of the order." *In re Sternitzky*, 635 B.R. 353, 361 (Bankr. W.D. Wis. 2021). "The party obtaining relief from the automatic stay may persuade the court to grant a shorter time period for the debtor to seek a stay pending appeal, or even grant no time." *Id.* No analysis has been provided to support the request to waive the application of Fed. R. Bankr. P. 4001(a)(3), and so the Court declines to do so.

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| <b>Party Information</b> |
|--------------------------|

**Debtor(s):**

Brian Bruce Davids

Represented By  
Matthew D. Resnik

**Joint Debtor(s):**

Amanda Wood Davids

Represented By  
Matthew D. Resnik

**Movant(s):**

Towd Point Mortgage Trust Asset-

Represented By  
Paul W Cervenka  
Kirsten Martinez

**Trustee(s):**

Elizabeth (ND) F Rojas (TR)

Pro Se

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**9:19-10080 Jorge Guerrero and Rosa Maria Guerrero**

**Chapter 13**

**#2.00 CONT'D Hearing**

RE: [67] Notice of motion and motion for relief from the automatic stay with supporting declarations REAL PROPERTY RE: 1087 Skeel Drive, Camarillo, CA 93010 .

FR. 6-27-23, 8-8-23

Docket 67

**Tentative Ruling:**

**September 12, 2023**

**Appearances are waived. The Court will grant the Motion pursuant to 11 U.S.C. § 362(d)(1) for the reasons set forth *infra*, but will deny the Motion as to its request that the Court waive Fed. R. Bankr. P. 4001(a)(3). Movant to upload a conforming order within 7 days.**

The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificate Holders of the CWABS, Inc., Asset-Backed Certificates, Series 2005-12 ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) in relation to the real property located at 1087 Skeel Drive, Camarillo, CA 93010 (the "Property") of Jorge Guerrero and Rosa Maria Guerrero (the "Debtors") on the grounds that: (1) Movant's interest in the Property is not adequately protected; and (2) the Debtors have failed to make post-confirmation mortgage payments as they became due under the *2<sup>nd</sup> Amended Chapter 13 Plan* (the "Plan"). See Docket No. 67, *Motion for Relief from Stay Under 11 U.S.C. § 362* (the "Motion"), pp. 3-4.

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property, (2) at its option, offer, provide and enter into a potential forbearance agreement or other loan workout/loss mitigation agreement by contacting Debtor, (3) waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 4001(a)(3), (4) upon entry of the order, for purposes of Cal. Civ. Code § 2923.5, the Debtors are borrowers as define in Cal. Civ. Code § 2920.5(c)(2)(C), and (5) if relief is not granted, adequate

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protection be ordered. *See id.* at p. 5.

The Motion was filed on June 2, 2023 and served upon the Debtors via U.S. Mail first class, postage prepaid on the same date. *See Motion, Proof of Service of Document*, p. 12.

The Debtors timely filed that *Response to Motion Regarding the Automatic Stay* (the "Response") on June 13, 2023. *See* Docket No. 69. In the Response, the Debtors assert that they expect to remit \$10,000.00 to Movant on June 16, 2023. *Id.* at p. 3. Following the remittance, the Debtors wish to enter into an adequate protection agreement for the remaining post-petition arrears. *Id.*

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay [] for cause, including the lack of adequate protection of an interest in property of such party in interest." Failure to make postpetition mortgage payments as they become due in a Chapter 13 case may constitute "cause" for relief from the automatic stay under § 362(d)(1). *See In re Marks*, 2012 WL 6554705, at \*11 (9th Cir. BAP Dec. 14, 2012), *aff'd*, 624 F. App'x 963 (9th Cir. 2015) (citing *In re Ellis*, 60 B.R. 432, 435 (9th Cir. BAP 1985).

Under the terms of the Plan, the Debtors are required to make regular payments to Movant under the terms of the prepetition lending agreement. *See* Docket No. 24, pp. 5-6, Class 2. Movant asserts that the Debtors defaulted on Plan payments consisting of three (3) unpaid post-confirmation payments of \$2,805.42 and four (4) payments of \$2,829.00. *See* Motion, p. 9. With attorneys' fees of \$1,238.00 and less a suspense account balance of \$2,793.36, Movant asserts that there is a total post-confirmation delinquency of \$18,176.90 (as of the date of the Motion) with a payment of \$2,829.00 becoming due June 1, 2023. *Id.* The last monthly payment of \$700.00 was received by Movant on September 26, 2022. *Id.*

According to the Debtor's response, they expect to remit \$10,000.00 to Movant by June 16, 2023. *See* Response, p. 3. At this time, the Court does not have evidence that the \$10,000.00 payment was made. Assuming, arguendo, the payment is made, the Debtor's would still be delinquent \$8,176.90.

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Cause has been shown sufficient to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) due to the Debtors' failure to make no less than seven (7) postpetition/post-confirmation mortgage payments pursuant to the terms of the Plan. The Motion will be granted unless the parties have agreed to an adequate protection order before the hearing.

As to Fed. R. Bankr. P. 4001(a)(3), "[t]he purpose of this provision is to permit a short period of time for the debtor or the party opposing relief to seek a stay pending an appeal of the order." *In re Sternitzky*, 635 B.R. 353, 361 (Bankr. W.D. Wis. 2021). "The party obtaining relief from the automatic stay may persuade the court to grant a shorter time period for the debtor to seek a stay pending appeal, or even grant no time." *Id.* No analysis has been provided to support the request to waive the application of Fed. R. Bankr. P. 4001(a)(3), and so the Court declines to do so.

**June 27, 2023**

**Appearances are waived. The Court will grant the Motion pursuant to 11 U.S.C. § 362(d)(1) for the reasons set forth *infra*, but will deny the Motion as to its request that the Court waive Fed. R. Bankr. P. 4001(a)(3). Movant to upload a conforming order within 7 days.**

The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2005-12 ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) in relation to the real property located at 1087 Skeel Drive, Camarillo, CA 93010 (the "Property") of Jorge Guerrero and Rosa Maria Guerrero (the "Debtors") on the grounds that: (1) Movant's interest in the Property is not adequately protected; and (2) the Debtors have failed to make post-confirmation mortgage payments as they became due under the 2<sup>nd</sup> Amended Chapter 13 Plan (the "Plan"). See Docket No. 67, *Motion for Relief from Stay Under 11 U.S.C. § 362* (the "Motion"), pp. 3-4.

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property, (2) at its option, offer, provide and enter into a potential forbearance agreement or other loan workout/loss mitigation agreement by contacting Debtor, (3)



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**Jorge Guerrero and Rosa Maria Guerrero**

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waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 4001(a)(3), (4) upon entry of the order, for purposes of Cal. Civ. Code § 2923.5, the Debtors are borrowers as define in Cal. Civ. Code § 2920.5(c)(2)(C), and (5) if relief is not granted, adequate protection be ordered. *See id.* at p. 5.

The Motion was filed on June 2, 2023 and served upon the Debtors via U.S. Mail first class, postage prepaid on the same date. *See Motion, Proof of Service of Document*, p. 12.

The Debtors timely filed that *Response to Motion Regarding the Automatic Stay and Declaration(s) in Support* (the "Response") on June 13, 2023. *See* Docket No. 69. In the Response, the Debtors assert that they expect to remit \$10,000.00 to Movant on June 16, 2023. *Id.* at p. 3. Following the remittance, the Debtors wish to enter into an adequate protection agreement for the remaining post-confirmation arrears. *Id.*

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay [] for cause, including the lack of adequate protection of an interest in property of such party in interest." Failure to make postpetition mortgage payments as they become due in a Chapter 13 case may constitute "cause" for relief from the automatic stay under § 362(d)(1). *See In re Marks*, 2012 WL 6554705, at \*11 (9th Cir. BAP Dec. 14, 2012), *aff'd*, 624 F. App'x 963 (9th Cir. 2015) (citing *In re Ellis*, 60 B.R. 432, 435 (9th Cir. BAP 1985).

Under the terms of the Plan, the Debtors are required to make regular payments to Movant under the terms of the prepetition lending agreement. *See* Docket No. 24, pp. 5-6, Class 2. Movant asserts that the Debtors defaulted on Plan payments to Movant consisting of three (3) unpaid post-confirmation payments of \$2,805.42 and four (4) payments of \$2,829.00. *See* Motion, p. 9. With attorneys' fees of \$1,238.00 and less a suspense account balance of \$2,793.36, Movant asserts that there is a total post-confirmation delinquency of \$18,176.90 (as of the date of the Motion) with a payment of \$2,829.00 becoming due June 1, 2023. *Id.* The last monthly payment of \$700.00 was received by Movant on September 26, 2022. *Id.*

According to the Response, the Debtors expect to remit \$10,000.00 to Movant by June 16, 2023. *See* Response, p. 3. At this time, the Court does not have evidence

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that the \$10,000.00 payment was made. Assuming, arguendo, the payment is made, the Debtors would still be delinquent \$8,176.90, with a payment due in June for a total of \$11,005.90.

Cause has been shown sufficient to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) due to the Debtors' failure to make no less than seven (7) postpetition/post-confirmation mortgage payments pursuant to the terms of the Plan. The Motion will be granted unless the parties have agreed to an adequate protection order before the hearing.

As to Fed. R. Bankr. P. 4001(a)(3), "[t]he purpose of this provision is to permit a short period of time for the debtor or the party opposing relief to seek a stay pending an appeal of the order." *In re Sternitzky*, 635 B.R. 353, 361 (Bankr. W.D. Wis. 2021). "The party obtaining relief from the automatic stay may persuade the court to grant a shorter time period for the debtor to seek a stay pending appeal, or even grant no time." *Id.* No analysis has been provided to support the request to waive the application of Fed. R. Bankr. P. 4001(a)(3), and so the Court declines to do so.

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| <b>Party Information</b> |
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**Debtor(s):**

Jorge Guerrero

Represented By  
Todd J Mannis

**Joint Debtor(s):**

Rosa Maria Guerrero

Represented By  
Todd J Mannis

**Movant(s):**

THE BANK OF NEW YORK

Represented By  
Mary D Vitartas  
Dane W Exnowski  
Kristin A Zilberstein

**Trustee(s):**

Elizabeth (ND) F Rojas (TR)

Pro Se

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**9:19-12044    Anabel Hernandez Munoz**

**Chapter 13**

**#3.00    CONT'D Hearing**

RE: [84] Amended Motion (related document(s): 73 Notice of motion and motion for relief from the automatic stay with supporting declarations REAL PROPERTY RE: 602 Green River Street, Oxnard, CA 93036 . filed by Creditor U.S. Bank Trust National Association, as Trustee of the Bungalow Series IV Trust)

FR. 4-18-23, 5-2-23, 5-30-23, 6-27-23, 8-8-23

Docket      84

**\*\*\* VACATED \*\*\*    REASON: Order granting motion was entered on  
August 25, 2023.**

**Tentative Ruling:**

**August 8, 2023**

**Appearances required. Where is this matter going?**

**June 27, 2023**

**Appearances required.**

**May 30, 2023**

**Appearances required.**

**May 2, 2023**

**Appearances are waived. The Court will grant the Motion pursuant to 11 U.S.C. § 362(d)(1) for the reasons set forth *infra*, but will deny the Motion as to its request that the Court waive Fed. R. Bankr. P. 4001(a)(3). Movant to upload a conforming order within 7 days.**

U.S. Bank Trust National Association, ("Movant") seeks a lifting of the automatic stay

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**CONT... Anabel Hernandez Munoz**

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pursuant to 11 U.S.C. § 362(d)(1) in relation to the real property located at 602 Green River Street, Oxnard, CA 93036 (the "Property") of Anabel Hernandez Munoz ("Debtor") on the grounds that: (1) Movant's interest in the Property is not adequately protected; and (2) the Debtor has failed to make post-confirmation mortgage payments as they became due under the *Amended Chapter 13 Plan* (the "Plan"). See Docket No. 35, *Motion for Relief from Stay Under 11 U.S.C. § 362* (the "Motion"), pp. 3-4.

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property, (2) at its option, offer, provide and enter into a potential forbearance agreement or other loan workout/loss mitigation agreement by contacting Debtor, (3) the co-debtor stay of 11 U.S.C. § 1201(a) or § 1301(a) be terminated, modified, or annulled as to the co-debtor on the same terms and conditions as to Debtor, and (4) waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 4001(a)(3). See *id.* at p. 5.

The Motion was filed on March 22, 2023 and served upon Debtor and non-filing co-debtor via U.S. Mail first class, postage prepaid on the same date. See Motion, *Proof of Service of Document*, p. 12. Pursuant to this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as the case may be." Neither Debtor, non-filing co-debtor, nor any other party served with the Motion has timely filed an opposition to the Motion. The Court therefore takes the default of all non-responding parties, including Debtor.

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay [] for cause, including the lack of adequate protection of an interest in property of such party in interest." Failure to make postpetition mortgage payments as they become due in a Chapter 13 case may constitute "cause" for relief from the automatic stay under § 362(d)(1). See *In re Marks*, 2012 WL 6554705, at \*11 (9th Cir. BAP Dec. 14, 2012), *aff'd*, 624 F. App'x 963 (9th Cir. 2015) (citing *In re Ellis*, 60 B.R. 432, 435 (9th Cir. BAP 1985).

Under the terms of the Plan, Debtor is required to make regular payments to Movant under the terms of the prepetition lending agreement. See Docket No. 37, p. 6, Class

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2. Movant asserts that Debtor defaulted on Plan payments consisting of eight (8) unpaid post-confirmation payments of \$2,700.38 and (1) payment of \$2,719.83. *See* Motion, p. 9. Less a suspense account balance of \$458.26, Movant asserts that there is a total post-confirmation delinquency of \$24,424.61 (as of the date of the Motion) with a payment of \$2,719.83 becoming due January 1, 2022.<sup>1</sup> *Id.* According to the Motion the last monthly payment of \$2,754.53 was received by Movant on September 6, 2022. *Id.*

Cause has been shown sufficient to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) due to Debtor's failure to make no less than eight (8) postpetition/post-confirmation mortgage payments pursuant to the terms of the Plan.

As to Fed. R. Bankr. P. 4001(a)(3), "[t]he purpose of this provision is to permit a short period of time for the debtor or the party opposing relief to seek a stay pending an appeal of the order." *In re Sternitzky*, 635 B.R. 353, 361 (Bankr. W.D. Wis. 2021). "The party obtaining relief from the automatic stay may persuade the court to grant a shorter time period for the debtor to seek a stay pending appeal, or even grant no time." *Id.* No analysis has been provided to support the request to waive the application of Fed. R. Bankr. P. 4001(a)(3), and so the Court declines to do so.

**April 18, 2023**

**Appearances waived.**

This matter is continued to May 2, 2023, at 10:00 a.m. due to the scheduled upgrade of CM/ECF system.

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| <b>Party Information</b> |
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**Debtor(s):**

Anabel Hernandez Munoz

Represented By  
Stephen L Burton

**Movant(s):**

U.S. Bank Trust National

Represented By  
Erica T Loftis Pacheco  
Kelli M Brown

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**Trustee(s):**

Elizabeth (ND) F Rojas (TR)

Pro Se

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**9:23-10309 James B Fredrickson**

**Chapter 7**

**#4.00** HearingRE: [12] Notice of motion and motion for relief from the automatic stay with supporting declarations REAL PROPERTY RE: 842 Provance Ave, Santa Maria, CA 93458 . (Schuler-Hintz, Kristin)

Docket 12

**Tentative Ruling:**

**September 12, 2023**

**The Court will grant for the reasons discussed *infra*. Movant is to lodge a conforming order within 7 days.**

Nationstar Mortgage, LLC ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and 11 U.S.C. § 362(d)(2) in relation to the residential real property located at 842 Provance Ave., Santa Maria, CA 93458 (the "Property") of James B. Fredrickson (the "Debtor") on the grounds that (1) Movant's interest in the Property is not protected by an adequate equity cushion, (2) the Debtor filed a statement of intentions that indicates his intention to surrender the Property, and (3) pursuant to 11 U.S.C. § 362(d)(2)(A), the Debtor has no equity in the Property and pursuant to 11 U.S.C. § 362(d)(2)(B) the Property is not necessary for an effective reorganization. *See* Docket No. 12, *Motion for Relief from the Automatic Stay Under 11 U.S.C. 362 – Real Property* (the "Motion").

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property, (2) at its option, offer, provide and enter into a potential forbearance agreement or other loan workout/loss mitigation agreement by contacting the Debtor, (3) waiver of the 14-day stay pursuant to Fed. R. Bankr. P. 4001(a)(3), and (4) upon the entry of the order, for purposes of Cal. Civ. Code § 2923.5, the Debtor is a borrower as defined in Cal. Civ. Code § 2920.5(c)(2)(C). *See* Motion, at p. 5.

The Motion and notice thereof were served upon the Debtor via U.S. Mail First class, postage prepaid on August 7, 2023, notifying the Debtor that pursuant to this Court's Local Rule 9013-1(d), any opposition to the Motion must be filed and served no less

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than fourteen (14) days prior to the hearing on the Motion. *See id.*, *Proof of Service of Document*, pg. 12. Pursuant to this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as the case may be." Neither the Debtor, nor any other party served with the Motion has timely filed an opposition to the Motion. The Court therefore takes the default of all non-responding parties, including the Debtor.

*Legal Standard*

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay [] for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1). While the term "adequate protection" is not defined in the Code, 11 U.S.C. § 361 sets forth three non-exclusive examples of what may constitute adequate protection: 1) periodic cash payments equivalent to decrease in value, 2) an additional or replacement lien on other property, or 3) other relief that provides the indubitable equivalent. *See In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984). "Equity cushion" is defined as the value in the property, above the amount owed to the creditor with a secured claim, that will shield that interest from loss due to any decrease in the value of the property during the time the automatic stay remains in effect. *Id.* at 1397. "Equity," as opposed to "equity cushion," is the value, above all secured claims against the property that can be realized from the sale of the property for the benefit of the unsecured creditors. *Id.*

"Although the existence of an equity cushion as a method of adequate protection is not specifically mentioned in § 361, it is the classic form of protection for a secured debt justifying the restraint of lien enforcement by a bankruptcy court." *Id.* (internal citations omitted). "In fact, it has been held that the existence of an equity cushion alone, can provide adequate protection." *Id.* (internal citations omitted). "A sufficient equity cushion has been found to exist although not a single mortgage payment had been made." *Id.* (internal citations omitted). "A 20% cushion has been held to be an adequate protection for a secured creditor." *Id.* at 1401. (internal citations omitted).

*Analysis*



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Here, Movant first contends that arrearages total \$26,784.09, which represents fifteen (15) unpaid payments of \$1,746.00 each (as of the date of the Motion) with a payment of \$1,746.00 becoming due August 1, 2023. *See* Motion, p. 8. Movant further alleges that its interest in the Property is not adequately protected. Movant has a secured claim against the Property in the amount of \$281,229.36. *Id.* As of the petition date of April 24, 2022, Movant asserts that the fair market value of the Property is \$300,000.00 per the Debtor's Schedule A/B. *Id.* at p. 37. Movant argues that the equity cushion in the Property exceeding Movant's liens is \$18,770.64 (Movant's lien of \$281,229.36 against the Property valued at \$300,000.00) or 6.26% of the fair market value. *Id.* at p. 8. Subtracting the total liens on the Property (including Movant's lien, the lien of Discover Home Equity Loans in the amount of \$90,000.00, and the lien of Goodleap, LLC in the amount of \$28,000.00), the Debtor's equity in the Property is negative \$99,229.36. *Id.*

Cause has been shown sufficient to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) as Movant's interest is not adequately protected. As there exists no equity in the Property, and because the Debtor intends on surrendering the Property (*see id.*, p. 49), the Motion is granted pursuant to 11 U.S.C. § 362(d)(2).

*The Discharge Injunction*

On August 28, 2023, the Court entered that *Order of Chapter 7 Discharge* (the 'Discharge Order") granting a discharge under 11 U.S.C. § 727 to the Debtor. *See* Docket No. 18.

Pursuant to 11 U.S.C. § 522(c)(2)(A), "[u]nless a case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except a debt secured by a lien that is (A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and (ii) not avoided under section 506(d) of this title."

"It is well settled that valid, perfected liens and other secured interests pass through bankruptcy unaffected." *See In re Cortez*, 191 B.R. 174, 177 (9th Cir. BAP 1995) (citing *Dewsnup v. Timm*, 502 U.S. 410, 418 (1992); *see also Siegel v. Fed. Home*

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*Loan Mortg. Corp.*, 143 F.3d 525, 531 (9th Cir. 1998). A "discharge [under 11 U.S.C. § 727] extinguishes only 'the personal liability of the debtor.'" *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991); *see also In re Cortez*, 191 B.R. at 178. "[T]he Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy." *Id.* (internal citations omitted); *see also In re Reed*, 640 B.R. 932, 938-939 (9th Cir. BAP 2022).

What is more, the Discharge Order contains the following language, "a creditor with a lien may enforce a claim against the debtors' property subject to that lien unless the lien was avoided or eliminated. For example, a creditor may have the right to foreclose a home mortgage or repossess an automobile". *See* the Discharge Order, p. 1.

It appears to the Court that upon entry of the Discharge Order, the automatic stay terminated as to the Property and the Movant retains the right to foreclose on the Property as a secured lienholder. Accordingly, the Court will grant the request to waive the application of Fed. R. Bankr. P. 4001(a)(3).

|                          |
|--------------------------|
| <b>Party Information</b> |
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**Debtor(s):**

James B Fredrickson

Represented By  
Gary R Colegrove

**Movant(s):**

Pingora Loan Servicing, LLC

Represented By  
Kristin A Schuler-Hintz

**Trustee(s):**

Sandra McBeth (TR)

Pro Se

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**9:23-10515 Deborah Rudd**

**Chapter 7**

**#5.00 CONT'D Hearing**

RE: [8] Notice of motion and motion for relief from the automatic stay with supporting declarations UNLAWFUL DETAINER RE: 748 E. Main Street, Ventura, CA 93001.

FR. 8-22-23

Docket 8

**Tentative Ruling:**

**September 12, 2023**

**Appearances waived. Motion is granted pursuant to 11 U.S.C. §§ 362(d)(1) and (d)(2) for the reasons stated *infra*. The Court further finds the stay terminated as to the Debtor and the Debtor's property as of July 25, 2023.**

The Becker Group, Inc. ("Movant") seeks relief as to the premises of the nonresidential property located at 748 E. Main Street, CA 93001 (the "Premises") pursuant to 11 U.S.C. § 362(d)(1) and 11 U.S.C. § 362(d)(2) on the grounds that 'cause' exists as the debtor Deborah Lee Rudd (the "Debtor"). *See Motion for Relief from the Automatic Stay or for An Order Confirming That Automatic Stay Does Not Apply Under 11 U.S.C. § 362(l)* (the "Motion") (Docket No. 8).

On October 12, 2022, Movant caused a notice to quit to be served on the Debtor. *See* Motion, p. 7. Movant commenced an unlawful detainer proceeding on October 18, 2022. *Id.* An unlawful detainer judgment was entered on November 17, 2022. *Id.* Under 11 U.S.C. § 362(d)(1), Movant contends that (1) the Debtor's right to possession of the Premises should be terminated because lease payments have not been made after the filing of the bankruptcy petition, and (2) pursuant to 11 U.S.C. § 362(d)(2)(A), the Debtor has no equity in the Premises, and pursuant to 11 U.S.C. § 362(d)(2)(B), the Premises are not necessary for reorganization. *Id.* at 4.

In addition to lifting the stay, Movant requests relief to (1) proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of

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the Property, (2) confirmation that there is no stay in effect after July 25, 2023 because the Debtor had a prior Chapter 13 case, case no. 9:17-bk-11261-RC (the "Prior Case") dismissed on February 21, 2023, and (2) the 14-day stay prescribed by FRBP 4001(a) (3) be waived.

A hearing on the Motion was initially held on August 22, 2023. The Debtor was served with the Motion at the incorrect zip code and the hearing was continued to September 12, 2023 to allow the Movant to correct service of the Motion.

*That Notice of Continued Hearing on Motion for Relief from the Automatic Stay or For Order Confirming that the Automatic Stay Does Not Apply Under 11 U.S.C. § 362(l) with a copy of the Motion attached thereto was filed on August 22, 2023 and served upon the Debtor via U.S. Mail first class, postage prepaid on the same date. See Docket No. 13, Proof of Service of Document, p. 9. Pursuant to this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as the case may be." Neither the Debtor, nor any other party served with the Motion has timely filed an opposition to the Motion. The Court therefore takes the default of all non-responding parties, including the Debtor.*

*Analysis*

*11 U.S.C. § 362(c)(3)(A)*

Pursuant to 11 U.S.C. § 362(c)(3)(A), where a Chapter 7 case is filed by a debtor, and where that debtor also had a Chapter 7 case dismissed within the year prior, "the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case." 11 U.S.C. § 362(c)(3)(A). The court may extend the stay upon the motion of a party of interest "after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed." 11 U.S.C. § 362(c)(3)(B).

The Debtor filed the petition in the instant case on June 25, 2023. The Prior Case was dismissed on February 21, 2023, which is within the year prior to the petition date in

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**Deborah Rudd**

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the instant case. Therefore, the stay terminated on the 30th day of filing the instant case or July 25, 2023, as to the Debtor and property of the Debtor pursuant to 11 U.S.C. § 362(c)(3)(A). The Debtor has not properly filed and noticed a motion for continuation of the automatic stay pursuant to 11 U.S.C. § 362(c)(3)(B) to date. Consequently, the Motion is granted to the extent it seeks an order confirming that the stay terminated as to the Debtor and property of the Debtor on July 25, 2023.

*11 U.S.C. § 362(d)(1)*

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay for cause, including the lack of adequate protection of an interest in property of such party in interest." Beyond the lack of adequate protection, "cause" is determined on a case-by-case basis. *See In re MacDonald*, 755 F.2d 715, 717 (9th Cir. 1985).

The Debtor has not paid monthly rent of \$3,300.00 beginning on September 1, 2022. *See Motion*, p. 6, ¶ 6. Furthermore, an unlawful detainer judgment was entered on November 17, 2022. *See id.*, p. 3, ¶ 5; Ex. D. The failure to pay post-petition lease payments on real property lease may constitute cause to lift the stay under 11 U.S.C. § 362(d)(1). *See In re Rocchio*, 125 B.R. 345, 347 (Bankr. D. RI 1991); *see also In re Touloumis*, 170 B.R. 825 (Bankr. S.D.N.Y. 1994); 11 U.S.C. § 365(d)(3)(A).

Under this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as the case may be." The Debtor has filed no response to the Motion. The Court takes the default of the Debtor.

As the Debtor has failed to make lease payments to Movant post-petition, the Motion is granted pursuant to 11 U.S.C. § 362(d)(1).

*11 U.S.C. § 362(d)(2)*

Pursuant to 11 U.S.C. § 362(d)(2), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay

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with respect to a stay of an act against property under subsection (a) of this section, if (A) the debtor does not have an equity in such property and (B) such property is not necessary to an effective reorganization." "Since reorganization is not relevant in Chapter 7, the only issues is whether there is equity in the property." *In re Preuss*, 15 B.R. 896, 897 (9th Cir. BAP 1981).

As there exists no equity in the Property for the Debtor, and because the instant case is one under Chapter 7, the Motion is granted pursuant to 11 U.S.C. § 362(d)(2).

Movant to lodge conforming order with seven (7) days.

**August 22, 2023**

**Appearances waived. Motion is denied without prejudice for the reasons stated *infra*. Movant to upload a conforming order within 7 days.**

The Becker Group, Inc. ("Movant") seeks relief as to the premises of the nonresidential property located at 748 E. Main Street, CA 93001 (the "Premises") pursuant to 11 U.S.C. § 362(d)(1) and 11 U.S.C. § 362(d)(2). *See Motion for Relief from the Automatic Stay or for An Order Confirming That Automatic Stay Does Not Apply Under 11 U.S.C. § 362(l)* (the "Motion") (Docket No. 8).

Pursuant to this Court's Local Rule 4001-1(c)(1)(C)(i), regarding motions to lift the automatic stay, "the movant must serve [] the debtor and debtor's attorney (if any)."

The Motion was filed on July 7, 2023 and purportedly served upon Debtor Deborah Lee Rudd via U.S. Mail first class, postage prepaid on the same date. *See Motion, Proof of Service of Document*, p. 9. The Debtor was served at the incorrect zip code of "93010." *Id.* The correct zip code is "93004." *See Docket No. 1, Official Form 101*, p. 2. Therefore, there is no evidence that the Debtor received proper notice of the Motion and the hearing thereon. The Motion is denied without prejudice for lack of proof of proper service. Movant is to upload a conforming order within 7 days.

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| <b>Party Information</b> |
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**Debtor(s):**

Deborah Rudd

Represented By  
Brian Nomi

**Movant(s):**

Daniel A Higson

Represented By  
Daniel A Higson

**Trustee(s):**

Sandra McBeth (TR)

Pro Se

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**9:23-10550 Robert James Guadagno**

**Chapter 7**

**#6.00** CONT'D Hearing  
RE: [14] Notice of motion and motion for relief from automatic stay with  
supporting declarations ACTION IN NON-BANKRUPTCY FORUM RE: 657  
Chinook Drive, Ventura, CA 93001.

FR. 8-22-23

Docket 14

**Tentative Ruling:**

**September 12, 2023**

**Appearances required.**

**August 22, 2023**

**Appearances required.**

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| <b>Party Information</b> |
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**Debtor(s):**

Robert James Guadagno

Pro Se

**Movant(s):**

Mary Ann Manning

Represented By  
Felicita A Torres

**Trustee(s):**

Jerry Namba (TR)

Pro Se



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**9:23-10674 Adonis Ventures LLC**

**Chapter 7**

**#7.00** HearingRE: [14] Notice of motion and motion for relief from the automatic stay with supporting declarations UNLAWFUL DETAINER RE: 394 Via Cresta, Newbury Park, CA 91320 . (Chang, Randy)

Docket 14

**Tentative Ruling:**

**September 12, 2023**

**Appearances waived. The Court will deny the Motion without prejudice for the reasons stated *infra*. Movant to upload a conforming order within 7 days.**

Pradeep K. Paspulate and Chandrarekha Paspulate ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) to proceed against the debtor, Adonis Ventures, LLC (the "Debtor"), in the nonbankruptcy action *Pradeep K. Paspulate, et. al. v. Adonis Ventures, LLC* (2023CLUD010394) filed on June 26, 2023 (the "Nonbankruptcy Action"), pending before the Superior Court for the State of California, Ventura County. *See Notice of Motion and Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362 (Action in Nonbankruptcy Forum)* (the "Motion") (Docket No. 14).

Movant seeks relief from stay on the grounds that (1) the bankruptcy case was filed in bad faith, (2) Movant is entitled to possession and the issue of possession is not pertinent to the bankruptcy estate, and (3) the Nonbankruptcy Action can be tried more expeditiously in the nonbankruptcy forum. *See id.* Movant also requests (1) waiver of the 14-day stay prescribed by FRBP 4001(a)(3), (2) the order be binding and effective in any bankruptcy case commenced by or against the Debtor for a period of 180 days, so that no further automatic stay shall arise in that case as to the Nonbankruptcy Action, and (3) the order be binding and effective in any future bankruptcy case, no matter who the debtor may be, without further notice. *See id.*, p. 5.

*Notice*

Pursuant to this Court's Local Rule 4001-1(c)(1)(C), the movant must serve a motion

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**Chapter 7**

for relief from the automatic stay upon: (i) the debtor and debtor's attorney (if any); (ii) the trustee or interim trustee (if any); and (iii) any other party entitled to notice under Fed. R. Bankr. P. 4001. *See* LBR 4001-1(c)(1)(C).

The Motion was served upon the Debtor's counsel, the Movant's counsel, the Chapter 7 Trustee, and the U.S. Trustee via Court Notice of Electronic Filing ("NEF"). *See* Motion, *Proof of Service of Document*, p. 9. The Debtor itself was not served with the Motion. *Id.* Therefore, service of the Motion was improper.

Additionally, it appears that Movant used the incorrect, mandatory form of motion. Movant appears to be seeking relief from stay to proceed with an unlawful detainer action in state court. The proper motion is entitled *Notice of Motion and Motion for Relief from the Automatic Stay or for Order Confirming that the Automatic Stay Does Not Apply Under 11 U.S.C. § 362(l) (Unlawful Detainer)*, form F 4001-1.RFS.UD.MOTION. Instead, Movant filed that *Notice of Motion and Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362 (Action in Nonbankruptcy Forum)*, form F 4001-1.RFS.NONBK.MOTION.

The Motion is denied without prejudice due to Movant's failure to properly serve the Debtor and Movant's failure to use the proper mandatory form motion for relief from stay regarding an unlawful detainer.

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| <b>Party Information</b> |
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**Debtor(s):**

Adonis Ventures LLC

Represented By  
Brian Nomi

**Movant(s):**

Pradeep K Paspulate

Represented By  
Randy Chang

**Trustee(s):**

Jerry Namba (TR)

Pro Se

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**9:22-10501 R.P. Ruiz Corporation**

**Chapter 11**

**#8.00 CONT'D Hearing**

RE: [286] Motion for Relief from Stay Motion for Entry of an Order Granting Henkels & McCoy, Inc.'s Relief from the Automatic Stay, For Cause, Pursuant to 11 USC § 362(D)(1) to Set Off Mutual Prepetition Obligations; Declaration of Randall Christiansen in Support Thereof.

FR. 8-8-23

Docket 286

**Tentative Ruling:**

**September 12, 2023**

**Appearances waived. The Motion is denied for failure to comply with LBR 9013-1(c) (2). Movant to upload a conforming order within 7 days.**

On July 5, 2022 (the "Petition Date"), the R.P. Ruiz Corporation, dba Richards Construction Company, Inc. (the "Debtor") filed a voluntary petition under Chapter 11 of Title 11 of the U.S. Code (this "Case"). *See* Docket No. 1. On July 7, 2023, Henkels & McCoy, Inc. (the "Movant") filed that *Motion for Relief from the Automatic Stay* (the "Motion"), seeking to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) to effectuate a setoff of mutual pre-petition obligations between the Debtor and Movant. *See* Docket No. 286.

A hearing on the Motion was initially held on August 8, 2023. The Motion was not served in compliance with Fed. R. Bankr. P. 4001(a) and this Court's Local Rule 4001-1(c)(1)(C) and the hearing was continued to September 12, 2023 to allow the Movant to correct service of the Motion.

That *Notice of Continuation of Hearing on Motion for Entry of an Order Granting Henkels & McCoy, Inc.'s Relief from the Automatic Stay, for Cause, Pursuant to 11 U.S.C. § 362(d)(1) to Set Off Mutual Prepetition Obligations* (the "Notice") with a copy of the Motion attached thereto was filed on August 10, 2023 and served upon the Debtor, the Debtor's counsel, and all creditors of the Debtor via U.S. Mail first class,

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postage prepaid on the same date. *See* Docket No. 312, *Proof of Service of Document*, pp. 55-61.

Pursuant to this Court's Local Rule 9013-1(c)(2), "[e]very motion must be accompanied by written notice of motion specifying briefly the relief requested in the motion and, if applicable, the date, time, and place of hearing. . . the notice of motion must advise the opposing party that LBR 9013-1(f) requires a written response to be filed and served at least 14 days before the hearing." The Notice and Motion attached thereto does not advise the opposing party that LBR 9013-1(f) requires a written response to be filed and served at least 14 days before the hearing. Therefore, notice of is deficient.

The Court denies the Motion without prejudice due to the Movant's failure to comply with LBR 9013-1(c)(2). The Movant is to upload a conforming order within seven days.

**August 8, 2023**

**Appearances waived. The Motion is denied without prejudice. The Movant is to upload a conforming order within seven days.**

*Background*

On July 5, 2022, R.P. Ruiz Corporation, dba Richards Construction Company, Inc. (the "Debtor") filed a voluntary petition under Chapter 11 of Title 11 of the U.S. Code (this "Case"). *See* Docket No. 1. On July 7, 2023, Henkels & McCoy, Inc. (the "Movant") filed that *Motion for Relief from the Automatic Stay* (the "Motion"), seeking to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) to effectuate a setoff of mutual pre-petition obligations between the Debtor and Movant. *See* Docket No. 286.

*Notice*

Pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(1), "[a] motion for relief from an automatic stay . . . shall be made in accordance with Rule 9014 and . . . on the

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creditors included on the list filed pursuant to Rule 1007(d)." Fed. R. Bankr. P. 4001(a)(1); *see also* Fed. R. Bankr. P. 1007(d) (describing the list of 20 largest creditors in a chapter 11 reorganization case). This Court's Local Rule 4001-1(c)(1)(C)(ii) further provides that the movant must serve the debtor and the debtor's counsel with the motion, notice of hearing, and all supporting documents.

The Motion and Notice were served upon the Debtor's counsel via U.S. Mail First Class, postage prepaid, on July 7, 2023, providing that, pursuant to this Court's Local Rule 9013-1(d), any opposition to the Motion must be filed and served no less than fourteen (14) days prior to the hearing on the Motion. *See* Docket No. 286, *Proof of Service of Document*, p. 51; Docket No. 287, *Proof of Service of Document*, p. 4. Neither the Debtor nor any other creditor included in that *List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders* were served with the Motion or Notice. The Motion is denied without prejudice due to the Movant's failure to comply with Fed. R. Bankr. P. 4001(a) and this Court's Local Rule 4001-1(c)(1)(C).

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| <b>Party Information</b> |
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**Debtor(s):**

R.P. Ruiz Corporation

Represented By  
Steven R Fox

**Movant(s):**

Henkels & McCoy, Inc.

Represented By  
Evelina Gentry

**United States Bankruptcy Court  
Central District of California  
Northern Division  
Ronald A Clifford III, Presiding  
Courtroom 201 Calendar**

**Tuesday, September 12, 2023**

**Hearing Room 201**

10:00 AM

**9:23-10061 South Bay Property Homes LLC**

**Chapter 11**

**#9.00 CONT'D Hearing**

RE: [43] Notice of motion and motion for relief from the automatic stay with supporting declarations REAL PROPERTY RE: 27009 Sea Vista Drive, Malibu, CA 90265 . (Wong, Jennifer)

FR. 7-25-23, 8-8-23

Docket 43

**Tentative Ruling:**

**September 12, 2023**

**Appearances required.**

JPMorgan Chase Bank, National Association ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and (d)(4) in relation to the real property located at 27009 Sea Vista Drive, Malibu, CA 90265 (the "Property") of South Bay Property Homes, LLC ("Debtor") on the grounds that (1) Movant's interest in the Property is not protected by an adequate equity cushion and the fair market value of the Property is declining, (2) proof of insurance regarding the Property has not been provided, (3) the bankruptcy case was filed in bad faith because other bankruptcy cases have been filed in which an interest in the Property was asserted, and (4) the filing of the bankruptcy petition was part of a scheme to delay, hinder, or defraud creditors that involved multiple bankruptcies affecting the Property. *See* Docket No. 43, *Motion for Relief from the Automatic Stay Under 11 U.S.C. 362 – Real Property* (the "Motion").

In addition to lifting the stay, Movant requests (1) that it may proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property, (2) waiver of the 14-day stay provided under Fed. R. Bankr. P. 4001(a)(3), (3) that a designated law enforcement officer may evict Debtor and any other occupant regardless of any future bankruptcy filing concerning the Property for 180 days from the hearing in the Motion upon recording a copy of the order or giving appropriate notice, (4) relief under 11 U.S.C. § 362(d)(4), including a

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finding that mortgagor, Iris Martin, through her corporate entity, filed a prior bankruptcy petition as a part of a scheme to delay, hinder, or defraud Movant and the three quitclaim deeds/grant deeds are unauthorized by Movant and the Court (5) that the order be binding and effective in any bankruptcy case commenced by or against any debtor who claims an interest in the Property for 180 days from the hearing on the Motion upon recording a copy of the order or giving appropriate notice, and (6) that the order is binding and effective in any future bankruptcy case, no matter who the debtor may be upon recording a copy of the order or giving appropriate notice. *See id.* at p. 5.

A hearing on the Motion was initially held on August 8, 2023. The Debtor was served with the Motion at the incorrect address the hearing was continued to September 12, 2023 to allow the Movant to correct service of the Motion.

***Notice***

That *Proof of Service* was filed on August 11, 2023 indicating that the Debtor was served at the proper address via U.S. Mail First class, postage prepaid on August 11, 2023. *See* Docket No. 65, *Proof of Service of Document*, p. 2. That *Notice of Continued Hearing on Motion for Relief from the Automatic Stay* was also filed on August 22, 2023 and served upon the Debtor, the borrower Iris Martin, and the Debtor's 20 largest unsecured creditors via U.S. Mail first class, postage prepaid on the same date. *See* Docket No. 66, *Proof of Service of Document*, pp. 3-5. The Debtor's counsel and the United States Trustee were served with notice of the continued hearing via NEF on August 11, 2023. *See id.*, p.3.

***Opposition***

On July 25, 2023, the Debtor filed that *Opposition to Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362* (the "Response"). *See* Docket No. 61. In the Response, the Debtor asserts that (1) Movant fails to demonstrate a lack of equity cushion protecting Movant's interest, (2) the Debtor has procured insurance on the Property, and (3) there is no scheme of intent to hinder, delay or defraud creditors. *See id.*

***Reply***

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On August 1, 2023, Movant filed that *Reply to Debtor's Opposition to Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362* (the "Reply"). See Docket. No. 64. In the Reply, Movant argues that stay relief is warranted because (1) the Debtor has no ability to reorganize Movant's debt, (2) the Debtor can't protect the Property, and (3) the Debtor lacks good faith. See *id.*

***Analysis***

***11 U.S.C. § 362(d)(1)***

Pursuant to 11 U.S.C. § 362(d)(1), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay [] for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1). While the term "adequate protection" is not defined in the Code, 11 U.S.C. § 361 sets forth three non-exclusive examples of what may constitute adequate protection: 1) periodic cash payments equivalent to decrease in value, 2) an additional or replacement lien on other property, or 3) other relief that provides the indubitable equivalent. See *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984). "Equity cushion" is defined as the value in the property, above the amount owed to the creditor with a secured claim, that will shield that interest from loss due to any decrease in the value of the property during the time the automatic stay remains in effect. *Id.* at 1397. "Equity," as opposed to "equity cushion," is the value, above all secured claims against the property that can be realized from the sale of the property for the benefit of the unsecured creditors. *Id.*

"Although the existence of an equity cushion as a method of adequate protection is not specifically mentioned in § 361, it is the classic form of protection for a secured debt justifying the restraint of lien enforcement by a bankruptcy court." *Id.* (internal citations omitted). "In fact, it has been held that the existence of an equity cushion alone, can provide adequate protection." *Id.* (internal citations omitted). "A sufficient equity cushion has been found to exist although not a single mortgage payment had been made." *Id.* (internal citations omitted). "A 20% cushion has been held to be an adequate protection for a secured creditor." *Id.* at 1401. (internal citations omitted).

First, Movant alleges that its interest in the Property is not adequately protected



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because it has a \$4,571,194.05 secured claim against the Property (\$3,974,586.83 principal, \$295,471.40 in accrued interest, \$7,473.00 in costs, and \$300,979.74 in advances less a suspense account of \$7,316.92), which came due and payable on August 1, 2021. *See* Motion, p. 7. The fair market value of the Property is \$7,400,000.00 as of the petition date of September 30, 2022 per Movant's exterior-only inspection residential appraisal report. *Id. at Ex. 5*. The equity cushion in the Property is \$2,828,805.95 or 38.23 % (fair market value of the property of \$7,400,000.00 less Movant's secured claim of \$4,571,194.05 less estimated costs of sale of \$592,000.00). *See* Motion, pp. 8-9. The Court finds a 38.23% equity cushion to be adequate protection for Movant. *See In re Mellor*, 734 F.2d 1396, 1401. [FN 1]

Second, Movant alleges that the Debtor's inability to reorganize is cause to terminate the stay. The Debtor filed this case approximately seven months ago on January 30, 2023. The Debtor is a non-operating entity and it does not anticipate any cash flow for the first six months of the case. *See* Docket No. 39, p. 5. As of two months ago, the Debtor was unable to obtain an appraisal of the Property due to its "state of disrepair." *See id.*, p. 3. To date, neither the Debtor, nor any interested party has filed a plan of reorganization. Overall, there has been little progress in this case, which concerns the Court.

Third, Movant alleges that the Debtor has failed to insure the Property. Failure to maintain insurance on a secured creditor's property (i.e., collateral) leaves the creditor without adequate protection and generally will be cause for lifting the stay. *See In re Monroe Park*, 17 B.R. 934, 939 (D. Del. 1982); *see also In re El Patio, Ltd.*, 6 B.R. 518, 522 (Bankr. C.D. Cal. 1980). In the Response, the Debtor provides evidence of a "Comprehensive Personal Liability Policy." *See* Response, Ex. A. The Court is unsure whether the Property is insured against loss. The proof of insurance provided by the Debtor appears to relate to personal liability for occurrences on the Property. If the Property itself is not insured against loss the stay should be lifted.

*11 U.S.C. § 362(d)(4)*

Movant additionally asserts that the bankruptcy was filed in bad faith as part of a scheme to hinder, delay, or defraud creditors because the Property is the subject of multiple bankruptcy filings. To obtain relief under 11 U.S.C. § 362(d)(4), the Court must find the following three (3) elements are present: (1) the debtor's bankruptcy

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filing was part of a scheme; (2) the object of the scheme was to delay, hinder or defraud creditors; and (3) the scheme must involve either (a) the transfer of some interest in the real property without the secured creditor's consent or court approval, or (b) multiple bankruptcy filings affecting the property. *In re Dorsey*, 476 B.R. 261, 265–66 (Bankr. C.D. Cal. 2012) citing *First Yorkshire Holdings, Inc. v. Pacifica L 22, LLC*. (*In re First Yorkshire Holdings, Inc.*), 470 B.R. 864, 870–871 (9th Cir. BAP 2012).

Here, there is a series of transfers of ownership of the Property without consent of Movant, which initially appear to be part of a scheme to hold off foreclosure of the Property. However, the scheme appears to be on the part of the original borrower and World Systems, Inc. and not the Debtor. The original borrower purported to transfer an interest in the Property to World Systems, Inc. for no or nominal consideration on November 14, 2013 without Movant's knowledge. *See* Motion, Ex. 6, p. 83. On February 6, 2019, World Systems, Inc. filed a voluntary Chapter 11 petition, case no. 1:19-bk-10282-MB. *Id.* at Ex. 7. South Bay Properties, LLC filed a proof of claim in the World Systems, Inc. case in the amount of \$2,636,749.16. *Id.* at Ex. 9. Pursuant to the terms of a settlement agreement between World Systems, Inc., the original borrower, Steve Miller, and South Bay Properties, LLC., South Bay Properties, LLC's proof of claim was reduced to \$750,000.00 with payments to South Bay Properties, LLC. *Id.* at Ex. 10. As part of the settlement, the original borrower executed a grant deed and deed in lieu of foreclosure transferring the Property to South Bay Properties, LLC to hold in trust in the event of default under the settlement agreement.

Subsequently, a dispute arose regarding nonpayment under the settlement agreement and the grant deed and deed in lieu of foreclosure was recorded on October 5, 2021. *Id.* at Ex. 6, pp. 85-93. Movant contends that the deed was recorded without its consent. However, Movant was on notice of the settlement terms and notice was given to Movant, and the Court approved the settlement agreement. *See* Response, *Declaration of Steven Miller*, p. 12, ¶ 5. It is not clear from the papers if Movant filed a response to the settlement motion. The transfer of the Property to the Debtor was part of a court approved settlement, which is distinguishable from the "new debtor syndrome" cited by Movant in the Reply.

Subsequently, on September 14, 2022, a quitclaim deed was recorded wherein South Bay Properties, LLC purported to transfer an interest in the Property to the Debtor.

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*See* Motion, Ex. 6, pp. 94-97. The Debtor contends that this transfer was only to correct an error in the name, i.e. South Bay Properties, LLC should have actually been South Bay Property Homes, LLC. *See* Response, *Declaration of Steven Miller*, p. 11, FN1.

Movant further argues that as its loan remained delinquent, a trustee's sale was scheduled for October 27, 2022. "However, in furtherance of a multi-year scheme to delay and hinder Secured Creditor [Movant] from pursuing foreclosure, Debtor South Bay Property Homes, LLC filed the instant bankruptcy on January 30, 2023." *See* Motion, pp. 13-14. The Debtor's filing bankruptcy three months after a scheduled foreclosure sale does not in itself evidence bad faith. Therefore, there is no evidence that the Debtor's filing of the bankruptcy petition was part of a scheme to delay, hinder, or defraud creditors.

[FN 1] In the Reply, Movant acknowledges that it has a 38% equity cushion. Yet, Movant argues that there are several other liens affecting the Property and, if those liens are found value, there is no overall equity in the Property. Therefore, it would also have a basis for relief under 11 U.S.C. § 362(d)(2). Since the Motion did not assert 11 U.S.C. § 362(d)(2) as a basis for relief, the Court declines to address it now.

**August 8, 2023**

**Appearances waived. The Motion is denied without prejudice for the reasons *infra*.**

JPMorgan Chase Bank, National Association ("Movant") seeks a lifting of the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and (d)(4) in relation to the real property located at 27009 Sea Vista Drive, Malibu, CA 90265 (the "Property") of South Bay Property Homes, LLC ("Debtor") on the grounds that (1) Movant's interest in the Property is not protected by an adequate equity cushion and the fair market value of the Property is declining, (2) proof of insurance regarding the Property has not been provided, (3) the bankruptcy case was filed in bad faith because other bankruptcy cases have been filed in which an interest in the Property was asserted, and (4) the filing of the bankruptcy petition was part of a scheme to delay, hinder, or defraud creditors that involved multiple bankruptcies affecting the Property. *See* Docket No. 43, *Motion for Relief from the Automatic Stay Under 11 U.S.C. 362 –*

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**CONT...**      **South Bay Property Homes LLC**  
*Real Property* (the "Motion").

**Chapter 11**

In addition to lifting the stay, Movant requests (1) that it may proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the Property, (2) waiver of the 14-day stay provided under Fed. R. Bankr. P. 4001(a)(3), (3) that a designated law enforcement officer may evict Debtor and any other occupant regardless of any future bankruptcy filing concerning the Property for 180 days from the hearing in the Motion upon recording a copy of the order or giving appropriate notice, (4) relief under 11 U.S.C. § 362(d)(4), including a finding that mortgagor, Iris Martin, through her corporate entity, filed a prior bankruptcy petition as a part of a scheme to delay, hinder, or defraud Movant and the three quitclaim deeds/grant deeds are unauthorized by Movant and the Court (5) that the order be binding and effective in any bankruptcy case commenced by or against any debtor who claims an interest in the Property for 180 days from the hearing on the Motion upon recording a copy of the order or giving appropriate notice, and (6) that the order is binding and effective in any future bankruptcy case, no matter who the debtor may be upon recording a copy of the order or giving appropriate notice. *See id.* at p. 5.

***Notice***

Pursuant to Fed. R. Bankr. P. 4001(a)(1) and this Court's Local Rule 4001-1(c)(B) and (C), the Motion must be served upon the "original borrower", the Debtor and the Debtor's attorney, and the Debtor's 20 largest unsecured creditors. The Motion and notice thereof were properly served upon Iris Martin (the "Original Borrower"), the Debtor's 20 largest unsecured creditors, and the Debtor's attorney. The Motion and notice thereof was served on the Debtor at the incorrect address of 27009 Sea Vista Drive, Malibu, CA 90265. According to the petition, the Debtor's address is 595 S. Burlingame Ave., Los Angeles, CA 90049. *See* Docket 1, p. 1. [FN 1] Therefore, notice of the Motion was defective.

The Motion is denied without prejudice.

[FN 1] The Debtor's address on the docket was incorrectly listed as 27009 Sea Vista Drive, Malibu, CA 90265 until June 20, 2023. The docket was updated on June 20, 2023 to correct the Debtor's address to the business/ mailing address that is listed on the Petition. *See* Docket No. 46.

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| <b>Party Information</b> |
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**CONT... South Bay Property Homes LLC**

**Chapter 11**

**Debtor(s):**

South Bay Property Homes LLC

Represented By  
Leslie A Cohen

**Movant(s):**

JPMorgan Chase Bank, National

Represented By  
Jennifer C Wong

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**9:23-10517 Global Premier Regency Palms Colton, LP**

**Chapter 11**

**#10.00** HearingRE: [41] Notice of motion and motion for relief from the automatic stay with supporting declarations REAL PROPERTY RE: 839 Fairway Avenue, Colton, California 92324 .

Docket 41

**Tentative Ruling:**

**September 12, 2023**

**Appearances required.**

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| <b>Party Information</b> |
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**Debtor(s):**

Global Premier Regency Palms

Represented By  
Garrick A Hollander  
Matthew J Stockl

**Movant(s):**

iBorrow REIT, L.P., a Delaware

Represented By  
Daniel H Reiss

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**9:23-10517    Global Premier Regency Palms Colton, LP**

**Chapter 11**

**#10.10    CONT'D Chapter 11 Status Conference**

**FR. 8-23-23**

Docket      1

**Tentative Ruling:**

**September 12, 2023**

**Appearances required.**

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| <b>Party Information</b> |
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**Debtor(s):**

Global Premier Regency Palms

Represented By  
Garrick A Hollander

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**9:23-10517      Global Premier Regency Palms Colton, LP**

**Chapter 11**

**#10.20      CONT'D Hearing**  
RE: [55] Motion Debtors Motion For Order Authorizing Post-Petition Secured  
Loan Pursuant To 11 U.S.C. §§ 364(C)(1), (2), (3) AND (D)(1) On All Assets;  
Memorandum Of Points And Authorities

FR. 9-1-23

Docket      55

**Tentative Ruling:**

**September 12, 2023**

**Appearances required.**

**September 1, 2023**

**Appearances required.**

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| <b>Party Information</b> |
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**Debtor(s):**

Global Premier Regency Palms

Represented By  
Garrick A Hollander  
Matthew J Stockl

**Movant(s):**

Global Premier Regency Palms

Represented By  
Garrick A Hollander  
Matthew J Stockl



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**9:22-10673 Carole D King**

**Chapter 7**

**#11.00** Pretrial Conference RE: [21] Motion to Dismiss Debtor

FR. 11-8-22, 12-7-22, 1-10-23, 2-22-23, 3-8-23, 3-22-23, 4-19-23, 6-13-23

Docket 21

**\*\*\* VACATED \*\*\* REASON: Vacated per order entered on 9-7-23 docket  
# 102.**

**Tentative Ruling:**

**September 12, 2023**

**See Calendar Item No. 12.**

**April 19, 2023**

**Appearance required.**

The Court will set an evidentiary hearing on the *Motion to Dismiss Involuntary Petition* unless the parties have resolved the matter at mediation.

**March 22, 2023**

**Appearances waived.**

The Court has reviewed the *Stipulation between the Petitioning Creditor and the Alleged Debtor to Continue Status Conference and Related Matters* (the "Stipulation"). See Docket No. 51. The parties have agreed through the Stipulation to continue all matters in this case until April 19, 2023, at 10:00 a.m.

The instant matter is continued to April 19, 2023, at 10:00 a.m.

**March 8, 2023**

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**CONT... Carole D King  
Appearances required.**

**Chapter 7**

**February 22, 2023**

**Appearances required.**

On January 10, 2023, the Court continued the status conference to February 22, 2023. *See* Docket No. 44. On January 26, 2023, the Court entered that *Order Assigning Matter to Mediation Program and Appointing Mediator and Alternate Mediator* in the John E King case. *See* Case No. 9:22-bk-10674, Docket No. 54.

**January 10, 2023**

**Appearances required.**

On August 31, 2022, Wolverine Endeavors VIII, LLC ("Petitioning Creditor") filed that *Involuntary Petition Against an Individual* (the "Original Petition") against Carole D. King ("King"). *See* Docket No. 1. In response to the Original Petition, on October 5, 2022, King filed that *Motion to Dismiss Involuntary Petition* (the "MTD"). *See* Docket No. 21. On October 11, 2022, Petitioning Creditor filed that *Motion for Leave to Amend Involuntary Petition Against an Individual* (the "MTA"). *See* Docket No. 24. On November 14, 2022, the Court entered its *Order Granting Petitioning Creditor's Motion to Amend Involuntary Petition*, which (1) granted the MTA, and (2) continued the MTD, applying the MTD to any amended petition filed by Petitioning Creditor. *See* Docket No. 38; *see also* Docket No. 37, *Order Continuing Hearing on Alleged Debtor's Motion to Dismiss Involuntary Petition*. On November 15, 2022, an *Amended Involuntary Petition Against an Individual* was filed by Petitioning Creditor against King (the "Amended Petition"). *See* Docket No. 39. No further documents have been filed by King or Petitioning Creditor.

As the case is currently postured, the MTD applies in its arguments as regarding the Amended Petition. *See* Docket No. 38, p. 2 (the MTD "is deemed to apply to any amended petition that is filed."). Therefore, the MTD is at issue.

At the hearing, the Court will discuss with the parties, two (2) issues, which issues the

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**CONT... Carole D King**

**Chapter 7**

parties should meet and confer on prior to the January 10, 2023 hearing. First, the Court will inquire as to whether King intends on moving forward with the MTD. Second, if the response to the initial query is that King intends on litigating the MTD, the Court will set the MTD for an evidentiary hearing, and the parties should be prepared to discuss dates and procedures for said evidentiary hearing. To assist the parties in their preparation, the Court informs the parties that the evidentiary hearing will take place in-person (including witnesses), in Courtroom 201, and the Court will depart from any of its Local Rules related to direct examination by declaration, requiring live direct examination.

**December 7, 2022**

**No appearances required.**

An *Amended Involuntary Petition Against an Individual* was filed on November 15, 2022. See Docket No. 39. The Court will continue the hearings in this matter to January 10, 2023, at 2:00 p.m. in light of the amended petition having been filed.

**November 8, 2022**

**Appearances required. The Court is inclined to grant leave to amend the involuntary petitions, subject to the conditions provided herein.**

***Relevant Background***

East West Bank ("EWB") obtained that *Judgment* (the "Judgment") as against, among others, John E. King and Carole D. King (collectively, the "Kings") on September 14, 2011, in the Superior Court of the State of California, County of San Francisco (the "State Court"). See Docket No. 24, pp. 26-27.<sup>1</sup> On May 17, 2021, that *Acknowledgment of Assignment of Judgment Entered September 14, 2011* was filed in the State Court related to the Judgment, whereunder EWB "assign[ed] and transfer[ed] all of [EWB's] right, title and interest, in the Judgment to: Wolverine Endeavors VIII, LLC, a California limited liability company ["Wolverine"]" (the

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**CONT... Carole D King**

**Chapter 7**

"Assignment"). *Id.* at pp. 22-25.

On August 31, 2022, Wolverine filed an *Involuntary Petition Against an Individual* as against each of the Kings (collectively, the "Petitions"). *See* Case Nos. 9:22-bk-10673-RC (Docket No. 1) and 9:22-bk-10674-RC (Docket No. 1). In response to Section 12 of the Petitions ("Has there been a transfer of any claim against the debtor by or to any petitioner?"), Wolverine checked the "No" box. *Id.* at p. 3. The Petitions were executed by Wolverine and its counsel, certifying that "the information provided in [the Petitions] is true and correct." *Id.* at p. 4.

This Court's Local Rule 1010-1 provides in part that "[t]he court may dismiss an involuntary petition without further notice and hearing if the petitioner fails to (a) prepare a Summons and Notice of Status Conference in an Involuntary Bankruptcy Case on the court-mandated form; (b) at the same time the involuntary petition is filed, submit the Summons and Notice of Status Conference to the clerk for issuance..." On September 1, 2022, the Clerk of Court notified Wolverine of its failure to comply with this Court's Local Rule (in each case) by an entry on the Court's Docket on September 1, 2022, using all caps and bold font, requiring Wolverine to file a summons "immediately" (caps removed) (the "Notice"). *See e.g.*, Docket No. 2. Lacking any response to the Notice by Wolverine, the Court issued its *Order to Show Cause Why the Case Should Not Dismiss for Failure to Comply with Local Rule 1010-1* (the "OSC"). *See e.g.*, Docket No. 4. Eventually, on September 8, 2022, Wolverine uploaded a Summons. *See e.g.*, Docket No. 6.

On October 5, 2022, the Kings filed a *Motion to Dismiss Involuntary Petition* in each of the cases (collectively, the "Motions to Dismiss"). *See e.g.*, Docket No. 21. As a threshold matter, the Kings argue in the Motions to Dismiss that the Petitions wholly fail to comply with Fed. R. Bankr. P. 1003(a), and should therefore be dismissed. On October 11, 2022, in partial response to the Motions to Dismiss, Wolverine filed in each case *Petitioning Creditor's Motion for Leave to Amend Involuntary Petition Against an Individual* (the "Motions to Amend"). *See e.g.*, Docket No. 24. To correct "inadvertent errors" in the Petition, "including but not limited to Item no. 12, Wolverine, through the Motions to Amend, seeks leave of this Court to file an "Amended Petition," copies of which are attached to the Motions to Amend as Exhibit 1. *Id.* at p. 10, lines 13-15. Exhibit 1 to the Motions to Amend, the proposed *Amended Involuntary Petition Against an Individual* (the "Amended Petitions"), now

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**CONT...**

**Carole D King**

**Chapter 7**

include an affirmative response to Section 12 of the Petitions and include a *Statement Pursuant to Fed. R. Bankr. P. 1003* (the "Statement"). *Id.* at Exhibit 1. The Statement provides, in part:

- The Judgment was not obtained, or transferred to [Wolverine], for the purpose of commencing this bankruptcy case; and
- On May 17, 2021, the Judgment was assigned unconditionally to [Wolverine] for cash consideration plus a net percentage of recovery to [EWB].

*Id.* at p. 2.

On October 25, 2022, the Kings in each of their cases filed an *Opposition to Motion to Amend Involuntary Petition* (the "Oppositions to Amend"), wherein the Kings argued that the proposed Amended Petitions continue with Wolverine's failure to comply with Fed. R. Bankr. P. 1003 in that the Amended Petitions omit: (1) "[w]hether the transfer was for security or unconditional; (2) [t]he consideration for the transfer; and (3) [t]he terms of the transfer." *See e.g.*, Docket No. 27, p. 2, lines 3-17.

***The Motion to Amend***

Pursuant to Fed. R. Bankr. P. 1003(a), "[a] transferor or transferee of a claim shall annex to the original and each copy of the petition a copy of all documents evidencing the transfer, whether transferred unconditionally, for security, or otherwise, and a signed statement that the claim was not transferred for the purpose of commencing the case and setting forth the consideration for and terms of the transfer." "Failure to comply with Rule 1003(a)'s requirements disqualifies a creditor from being a petitioning creditor." *In re Banner Resources LLC*, 2021 WL 2189085 \*2 (Bankr. N.D. Tex. 2021)(citing *In re Oberle*, 2006 WL 3949174 \*1 (Bankr. N.D. Cal. 2006).

It is undisputed here that the Petitions did not comply with Fed. R. Bankr. P. 1003, as is evidenced in part by the Motions to Amend. Specifically, the Petitions did not disclose that Wolverine's asserted claims against the Kings were founded in a pre-petition assignment from EWB to Wolverine. The Petitions contains two (2) errors. First, on their face, the Petitions answer Section 12 in the negative, and second, the Petitions were not accompanied by the statements and documents required under Fed. R. Bank. P. 1003(a).

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The Oppositions to Amend appear to raise two (2) arguments in response to the Motions to Amend as they relate to the Fed. R. Bankr. P. 1003(a) disclosure issue. First, the Oppositions to Amend argue, it seems to the Court, that the Motions to Amend are an act in futility because the very amended petitions they seek leave to file continue in the noncompliance with Fed. R. Bankr. P. 1003(a). *See e.g.*, Docket No. 27, p. 2. The second argument appears to accuse Wolverine of bad faith in filing the Petitions with the disclosure issues, asserting that the omissions were tactical. *Id.* at p. 3. The Kings further raise as evidence of bad faith, Wolverine's use of the term "inadvertent" in the Motions to Amend to describe its failure to comply with Fed. R. Bankr. P. 1003(a). *Id.* at p. 3.

Jurisprudentially, assuming a fact pattern comparable to the case at issue, where just one (1) petitioning creditor exists, courts have held that the failure to comply with Fed. R. Bankr. P. 1003(a) disqualify that creditor from being a qualifying petitioning creditor, and may therefore result in dismissal of the involuntary petition. *See In re Banner Resources LLC*, 2021 2189085 \*2 (Bankr. N.D. Tex. 2021)("Failure to comply with Rule 1003(a)'s requirements disqualifies a creditor from being a petitioning creditor"); *In re Oberle*, 2006 WL 3949174 \*1 (Bankr. N.D. Cal. 2006); *In re Clignett*, 567 B.R. 583, 587 (Bankr. C.D. Cal. 2017). However, Fed. R. Bankr. P. 1003(a) cannot be read in a vacuum, and when a petition is challenged under Fed. R. Bankr. P. 1003(a), as the Petitions have been, 11 U.S.C. § 303(b) and Fed. R. Bankr. P. 1003(b) and 1018 are to be analyzed by the Court.

Federal Rule of Bankruptcy Procedure 1003(b) and 11 U.S.C. § 303(b) will be discussed more fully *infra*, but suffice it to state here, an involuntary petition does not fail because one (1) or more of the petitioning creditors do not qualify as a petitioning creditor(s) under 11 U.S.C. § 303(b), as Fed. R. Bankr. P. 1003(b) and 11 U.S.C. § 303(c) allow for the later joinder of qualifying petitioning creditors.

**Leave to Amend**

Federal Rule of Bankruptcy Procedure 1018 provides in relevant part that "[u]nless the court otherwise directs and except as otherwise prescribed in Part I of these rules, the following rules in Part VII apply to all proceedings contesting an involuntary petition []: Rule[] 7015." Federal Rule of Bankruptcy Procedure 7015 provides that "Rule 15 FR Civ P applies in adversary proceedings." Federal Rule of Civil

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Procedure 15(a)(2) provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." "Normally, when a viable case may be pled, a district court should freely grant leave to amend." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011)(internal citations omitted). The Ninth Circuit has "stressed Rule 15's policy of favoring amendments, and [has] applied this policy with liberality." *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). "However, 'liberality in granting leave to amend is subject to several limitations.'" *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Systems, Inc.*, 637 F.3d at 1058. "Those limitations include undue prejudice to the opposing party, bad faith by the movant, futility, and undue delay." *Id.* "Not all of the factors merit equal weight. As this circuit and others have held, it is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)(internal citations omitted). The opposing party to the amendment "bears the burden of showing prejudice." *DCD Programs, Ltd. V. Leighton*, 833 F.2d 183, 186-187 (9th Cir. 1987).

As noted, *supra*, the Petitions are both wanting in their compliance with Fed. R. Bankr. P. 1003(a), and thus, absent leave to amend the Petitions, Wolverine is disqualified as a petitioning creditor in both of the Kings' cases. The question, then, is whether the Court grants Wolverine leave to file the Amended Petition under Fed. R. Bankr. P. 7015, and, by reference, Fed. R. Civ. P. 15(a). The Court first turns to current Ninth Circuit jurisprudence in analyzing the Motions to Amend. In engaging in its analysis, as stated by the Ninth Circuit, the Court is to indulge amendments up to, and to the extent of the well-delineated limitations set out by the Ninth Circuit.

*Undue Prejudice to Opposing Party*

The Oppositions to Amend do not discuss the prejudice that would befall the Kings with approval of the proposed amendments to the Petitions. The Oppositions to Amend raise the arguments of futility and bad faith. *See e.g.*, Docket No. 27, pp. 2-3. The Oppositions to Amend, therefore, lack in their analysis the factor regarded by the Ninth Circuit as the being of supreme rank, weighted disproportionately to that of the balance of the factors.

The record appears to the Court to establish that any prejudice to the Kings in the



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Court's allowance of the proposed amendments to the Petitions is minimal. The proposed amendments are the first amendments to the Petitions requested by Wolverine. The proposed amendments are not wholesale rewrites of the Petitions, but are amendments to provide the Kings and this Court with disclosure as to the assignment by EWB to Wolverine of the claims EWB has against the Kings. The Motions to Amend were filed 41 days after the date the Petitions were originally filed. What is more, the assignment has been known by the Kings for more than a year prior to the Petition Date, so there is no surprise to the Kings regarding disclosure of the assignment through the proposed amendments to the Petitions.

The Court rules that there is no undue prejudice to the Kings in allowing the proposed amendments to be made to the Petitions.

*Bad Faith*

It seems to the Court as if the bad faith argument of the Oppositions to Amend focus on the non-disclosure of the assignment. *See e.g.*, Docket No. 27, p. 3. The Kings focus in on the term "inadvertent" as used by Wolverine, seemingly arguing that the use of the term suggests bad faith. As already discussed, it is not in dispute that Wolverine failed to make the required disclosures of Fed. R. Bankr. P. 1003(a). Not only did Wolverine fail to disclose the assignment from EWB to Wolverine on the Petitions themselves, but it also failed to include the required statement and documents. The Failure of the Kings to check the box on the Petitions disclosing the assignment could be said to be "inadvertent," perhaps, but the failure to include the required statement is better described as being either tactical, based in ignorance of the law, and/or a slovenly preparation of the Petitions. The Court leans towards the latter two (2) explanations. Wolverine conducted at least three (3) pre-petition judgment debtor's examinations of one or both of the Kings totaling more than eighteen (18) hours, and filed the Assignment with the State Court, all occurring months prior to the Petition Date. Attempting to engage in litigation by ambush, or seeking to file the Petitions without the disclosures required by Fed. R. Bankr. P. 1003(a) as a litigation tactic, seem unlikely given the Kings' awareness of the pre-petition assignment. Wolverine has already had its issues with untidiness in these cases as evidenced by the OSCs issued by the Court for the failure to properly file summonses with the Petitions. The lack of Fed. R. Bankr. P. 1003(a) disclosure



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seems to fall in-line more with the disordered nature of the filings than with bad faith.

The Court does not find the existence of bad faith in Wolverine's seeking of the proposed amendments to the Petitions.

*Futility*

The Kings argue that the proposed amendments to the Petitions would be an exercise in futility in that the proposed amendments would not fully remedy Wolverine's failure to disclose as required by Fed. R. Bankr. P. 1003(a). *See e.g.*, Docket No. 27, p. 2. Here, the Court agrees. In part, Fed. R. Bankr. P. requires a signed statement that "set[s] forth the consideration for and terms of the transfer." Wolverine describes the consideration it paid (or is paying) for the claims against the Kings as "cash consideration plus a net percentage of recovery to the seller." *See, e.g.*, Docket No. 31, p. 2, lines 18-20. If the absolute purpose of Fed. R. Bankr. P. 1003(a) is to ferret out petitioning creditors that purchase claims solely for the purpose of filing an involuntary bankruptcy petition, then the purpose of requiring the consideration of terms of any such transfer is clear, it must be specific. Simply disclosing that "cash" was paid is meaningless to the party analyzing the petition under Fed. R. Bankr. P. 1003(a). It cannot be enough for Wolverine to vaguely disclose what it paid for the claims against the Kings and still comply with Fed. R. Bankr. P. 1003(a).

The Court rules that the Petitions must be amended to specifically disclose what actual consideration (in dollars to the extent dollars traded hands) was paid by Wolverine to EWB, the specifics of the split of any recovery, and the terms of the transfer. If the purpose of Fed. R. Bankr. P. 1003(a) is disclosure, then the disclosure must be meaningful.

*Undue Delay*

The Kings do not argue undue delay, and as discussed herein, the delay from the filing of the Petitions to the filing of the Motions to Amend was 41 days. The delay from the time that the Motions to Dismiss were filed to the filing of the Motions to Amend was six (6) days. The Court does not find that the Motions to Amend constitute an undue delay on the part of Wolverine.

The Court will grant the Motions to Amend, solely with the exception that the consideration and terms of transfer regarding the Assignment be specifically disclosed

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in any amended petitions. The amended petitions must be filed within seven (7) days of the hearing on the Motions to Amend. Further, within seven (7) days of the hearing on the Motions to Amend, Wolverine shall serve a notice of a continued hearing on the Motions to Dismiss on all known creditors of the Kings, and disclosing to those creditors Fed. R. Bankr. 1003(b) and 11 U.S.C. § 303(c).

Wolverine is to upload a conforming order within seven (7) days.

***The Motions to Dismiss***

In the *Motions to Dismiss*, the Kings first argue that the Petitions violate Fed. R. Bankr. P. 1003(a). *See e.g.*, Docket No. 21, pp. 2-3. The Kings next argue that the Petitions violate 11 U.S.C. § 303(b)(1) because the Kings have in excess of twelve (12) creditors, and Wolverine failed to include at least three (3) petitioning creditors with the Petitions. *Id.* at p. 3. The Kings lastly contend that they are not insolvent in that they are generally paying their debts as they come due. *Id.* at p. 4.

On October 25, 2022, Wolverine filed those *Oppositions to the Motions to Dismiss* (The "Oppositions to Dismissal"). *See e.g.*, Docket No. 26. Regarding Fed. R. Bankr. P. 1003(a), Wolverine argues that it filed the Amended Petitions to cure any deficiencies of the Petitions. *Id.* at p. 6.

As to numerosity, Wolverine contends that J.E. King testified to significantly less than twelve (12) unsecured, qualifying creditors at the judgment debtor exam on March 22, 2022, and further argues that at least 41 of the alleged creditors disclosed in the Motions to Dismiss appear unqualified because they are either insiders or recipients of avoidable transfers. *Id.* at pp. 4-5. However, Wolverine asserts that "discovery is critical to determine whether, in fact, the Kings have more than 12 qualifying creditors." *Id.* at p. 5, lines 13-14.

Wolverine also asserts that the Kings are not current on the judgments that have been entered against them in the principal amount of \$29,102,613.93 and based on the totality of the circumstances test, the Kings are not generally paying their debts as they become due under Section 303(h)(1). *Id.* at p. 4. Specifically, Wolverine notes that the Kings have failed for over ten (10) years to satisfy the Judgment. *Id.* at p. 2.

"In many cases, a bankruptcy court will not be able to dismiss an involuntary case solely on a motion to dismiss. If the petitioning creditors plausibly allege that they

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have met the standards, the motion must fail, and the involuntary debtor must answer." *In re QDOS, Inc.*, 607 B.R. 338, 345 (9th Cir. BAP 2019).

*Threshold Issues*

The Court, as discussed above, is inclined to grant the Motions to Amend, with certain requirements. Therefore, a motion to dismiss the Petitions is not ripe for decision at this juncture, as neither the Court, nor the Kings have seen any amended petitions other than those attached to the Motions to Amend, which the Court is requiring contain certain amendments.

As will be discussed below, Fed. R. Bankr. P. 1003(b) and 11 U.S.C. § 303(c) allow for creditors to join the Petitions prior to dismissal of the cases. As noted above, the Court is requiring service on all known creditors of the Kings, notice of Fed. R. Bankr. P. 1003(b) and 11 U.S.C. § 303(c), and of a continued hearing on the Motions to Dismiss. The Court will allow other creditors the reasonable opportunity to join the Petitions before ruling on any motions to dismiss the Petitions or any amendment to those Petitions.

When/if the amended petitions are filed by the Court's imposed deadline, the Motions to Dismiss may be renewed, or the Kings may answer the amended petitions. If Wolverine does not amend the Petitions, and if there are no additional creditors that move to join the Petitions to satisfy the numerosity requirements under 11 U.S.C. §§ 303(b)(1) and (2), then there is nothing for the Court to decide.

*Qualifications for a Petitioning Creditor*

As provided by 11 U.S.C. §§ 303(b)(1) and (2):

An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, is such noncontingent, undisputed claims aggregate at least \$16,750 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims; f there are fewer than 12 such holders, excluding any employee or

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insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least \$16,750 of such claims.

"Where there are fewer than three required petitioning creditors, the Code and Rules allow for Civil Rule 24(a)(1) joinder," "[t]hus, joinder may remedy a defect in the number of petitioning creditors." *In re QDOS, Inc.*, 607 B.R. at 343. "In deciding the issue before it, whether joinder could cure even a tainted initial petition, the *Kidwell* court emphasized that such joinder was a matter of right." *Id.*; see also *In re Kidwell*, 158 B.R. 203, 207 (Bankr. E.D. Cal. 1993)("Under the Bankruptcy Code, joinder can cure a deficiency in number, even if the first petitioner cheated.") "[G]enerally when an alleged debtor answers a petition filed by fewer than three qualifying petitioners, asserts the § 303(b)(1) three-petitioning creditors requirement, and alleges that it has twelve or more creditors, the bankruptcy court 'must assure that other creditors have a reasonable opportunity to exercise their § 303(c) statutory power to join as petitioners.'" *In re QDOS, Inc.*, 607 B.R. at 344; see also *Liberty Tool v. Vortex Fishing Sys. (In Re Vortex Fishing Sys.)*, 277 F.3d 1057, 1062 (9th Cir. 2002).

The Kings have raised the issue of numerosity, and the Court is providing creditors of the Kings with a reasonable opportunity to join the Petitions, or any amendment to those Petitions. This is required under the Bankruptcy Code and Ninth Circuit Jurisprudence. Only after creditors have been afforded a reasonable opportunity to join the Petitions will the Court address the issues on the merits.

*Fed. R. Bankr. P. 1003(a)*

The Kings again raise the issue of non-compliance with Fed. R. Bankr. P. 1003(a), and cite *In re Clignett* as standing for the position that this failure alone must result in dismissal of the Petitions. See e.g., Docket No. 21, pp. 2-3. This case is distinguishable from *Clignett*, however. In *Clignett*, the Court dismissed the case for the failure of the petition to comply with Fed. R. Bankr. P. 1003(a), but also noted that the petitioning creditor "made no attempt to seek leave of the Court to amend the petition, and therefore, the Court determines [petitioning creditor] cannot rely on FED. R. CIV. P. Rule 15(a)(2) either." *In re Clignett*, 567 B.R. 583, 587 (Bankr. C.D. Cal. 2017). Here, Wolverine has moved for leave of this Court to file an amended

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petition, and so the Court is relying on Fed. R. Civ. P. 15(a) in allowing leave to amend.

The Court does not reach the merits of the Motions to Dismiss in large part, and should the Petitions be amended, the Kings will have a renewed opportunity to file a motion to dismiss one (1) or both of the Petitions, or to answer them. It seems at this juncture, however, given the Court's inclination to allow Wolverine leave to amend the Petitions, it is premature to rule on the merits of amended petitions that have not been filed (if they ever will be).

The Court will discuss a continued hearing date for the Motions to Dismiss with the parties.

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| <b>Party Information</b> |
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**Debtor(s):**

Carole D King

Represented By  
William C Beall  
Carissa N Horowitz

**Movant(s):**

Carole D King

Represented By  
William C Beall  
Carissa N Horowitz

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**9:22-10673 Carole D King**

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**#12.00** CONT'D Hearing RE: Chapter 7 Status Conference (RE: [1] Involuntary Petition)

FR. 11-8-22, 12-7-22, 1-10-23, 2-22-23, 3-8-23, 3-22-23, 4-19-23, 6-13-23

Docket 1

**Tentative Ruling:**

**September 12, 2023**

**Appearances required.**

That (1) *Order Granting in Part Petitioning Creditor Wolverine Endeavors VIII, LLC's Ex Parte Motion to Continue Evidentiary Hearing on Motion to Dismiss and* (2) *Scheduling Order* was entered in the matter of John E. King, continuing the evidentiary hearing on the *Motion to Dismiss Involuntary Petition* in that case to October 3, 2023. See Case No. 9:22-bk-10674-RC, Docket No. 137. No such proposed order was lodged in the matter of Carole D. King as instructed by the Court.

**June 13, 2023**

**Appearances required.**

The Court will set the *Motion to Dismiss Involuntary Petition* for trial.

**April 19, 2023**

**Appearance required.**

The Court will set an evidentiary hearing on the *Motion to Dismiss Involuntary Petition* unless the parties have resolved the matter at mediation.

**March 22, 2023**

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Appearances waived.**

**Chapter 7**

The Court has reviewed the *Stipulation between the Petitioning Creditor and the Alleged Debtor to Continue Status Conference and Related Matters* (the "Stipulation"). See Docket No. 51. The parties have agreed through the Stipulation to continue all matters in this case until April 19, 2023, at 10:00 a.m.

The instant matter is continued to April 19, 2023, at 10:00 a.m.

**March 8, 2023**

**Appearances required.**

**February 22, 2023**

**Appearances required.**

**January 10, 2023**

*See Calendar Item 29.*

**December 7, 2022**

**No appearances required.**

*An Amended Involuntary Petition Against an Individual* was filed on November 15, 2022. See Docket No. 39. The Court will continue the hearings in this matter to January 10, 2023, at 2:00 p.m. in light of the amended petition having been filed.

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| <b>Party Information</b> |
|--------------------------|

**Debtor(s):**

Carole D King

Represented By

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**CONT...**

**Carole D King**

William C Beall  
Carissa N Horowitz

**Chapter 7**



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**9:22-10674 John E King**

**Chapter 7**

**#13.00** Pretrial Conference  
RE: [24] Motion to Dismiss Debtor

FR. 11-8-22, 12-7-22, 1-10-23, 2-22-23, 3-8-23, 3-22-23, 4-19-23, 6-13-23

Docket 24

**\*\*\* VACATED \*\*\* REASON: Off Calendar Based on Hearing Held on  
8/24/23 and Order Entered on 8/29/23 (Docket 137).**

**Tentative Ruling:**

**April 19, 2023**

**Appearance required.**

The Court will set an evidentiary hearing on the *Motion to Dismiss Involuntary Petition* unless the parties have resolved the matter at mediation.

**March 22, 2023**

**Appearances waived.**

The Court has reviewed the *Stipulation between the Petitioning Creditor and the Alleged Debtor to Continue Status Conference and Related Matters* (the "Stipulation"). See Docket No. 66. The parties have agreed through the Stipulation to continue all matters in this case until April 19, 2023, at 10:00 a.m.

The instant matter is continued to April 19, 2023, at 10:00 a.m.

**March 8, 2023**

**Appearances required.**

**February 22, 2023**

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**Appearances required.**

On January 10, 2023, the Court continued the status conference to February 22, 2023. See Docket No. 50. On January 26, 2023, the Court entered that *Order Assigning Matter to Mediation Program and Appointing Mediator and Alternate Mediator*. See Docket No. 54.

**January 10, 2023**

**Appearances required.**

See Calendar Item 29, as the filings and orders in the instant case are substantially similar to those in *In re Carole D. King*, Case No. 9:22-bk-10673-RC. The Court intends on hearing the cases concurrently.

**December 7, 2022**

**No appearances required.**

An *Amended Involuntary Petition Against a Individual* was filed on November 15, 2022. See Docket No. 44. The Court will continue the hearings in this matter to January 10, 2023, at 2:00 p.m. in light of the amended petition having been filed.

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| <b>Party Information</b> |
|--------------------------|

**Debtor(s):**

John E King

Represented By  
William C Beall  
Carissa N Horowitz

**Movant(s):**

John E King

Represented By  
William C Beall  
Carissa N Horowitz

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**9:22-10674 John E King**

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**#14.00** CONT'D Hearing RE: Chapter 7 Status Conference (RE: [1] Involuntary Petition)

FR. 11-8-22, 12-7-22, 1-10-23, 2-22-23, 3-8-23, 3-22-23, 4-19-23, 6-13-23

Docket 1

**Tentative Ruling:**

**September 12, 2023**

**Appearances waived. This matter is continued to October 3, 2023, at 9:00 a.m.**

**June 13, 2023**

**Appearances waived.**

The Court will continue the status conference to June 27, 2023, at 2:00 p.m.

**April 19, 2023**

**Appearance required.**

The Court will set an evidentiary hearing on the *Motion to Dismiss Involuntary Petition* unless the parties have resolved the matter at mediation.

**March 22, 2023**

**Appearances waived.**

The Court has reviewed the *Stipulation between the Petitioning Creditor and the Alleged Debtor to Continue Status Conference and Related Matters* (the "Stipulation"). See Docket No. 66. The parties have agreed through the Stipulation to continue all matters in this case until April 19, 2023, at 10:00 a.m.

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**Chapter 7**

The instant matter is continued to April 19, 2023, at 10:00 a.m.

**March 8, 2023**

**Appearances required.**

**January 10, 2023**

**Appearances required.**

*See* Calendar Item 29, as the filings and orders in the instant case are substantially similar to those in *In re Carole D. King*, Case No. 9:22-bk-10673-RC. The Court intends on hearing the cases concurrently.

**December 7, 2022**

**No appearances required.**

An *Amended Involuntary Petition Against an Individual* was filed on November 15, 2022. *See* Docket No. 39. The Court will continue the hearings in this matter to January 10, 2023, at 2:00 p.m. in light of the amended petition having been filed.

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| <b>Party Information</b> |
|--------------------------|

**Debtor(s):**

John E King

Represented By  
William C Beall  
Carissa N Horowitz

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**Hearing Room 201**

2:00 PM

**9:21-11034 Maureen Elva Bowen**

**Chapter 13**

**#15.00 CONT'D Hearing**

RE: [52] Application for Compensation Application of Attorney for Debtor for Additional Fees and Related Expenses in a Pending Chapter 13 Case Subject to a Rights and Responsibilities Agreement (RARA); Declaration of Matthew D. Resnik in Support Thereof, with proof of service for Matthew D. Resnik, Debtor's Attorney, Period: to, Fee: \$350, Expenses: \$0.

FR. 7-11-23

Docket 52

**Tentative Ruling:**

**September 12, 2023**

**Appearances required.**

Pursuant to this Court's Local Rule 2016-1(a)(1)(J), as to all interim fee applications, the application must be accompanied by "[a] separately filed declaration from the client indicating that the client has reviewed the fee application and has no objection to it. If the client refuses to provide such a declaration, the professional person must file a declaration describing the steps that were taken to obtain the client's declaration and the client's response thereto." In this case, the debtor was deceased at the time of the work performed by the Applicant. The Application was approved by "Brett Miles on behalf of Maureen Elva Bowen" who "is the Debtor's son-in-law." See Docket No. 64, *Declaration of Russell J. Stong, III*, p. 7, lines 22-25. It is not clear to the Court whether Mr. Miles is a party that may in-fact authorize the work of the Applicant on behalf of the Debtor.

**July 11, 2023**

**Appearances required.**

*Background*

On October 20, 2021, Maureen Elva Bowen (the "Debtor") filed a voluntary Chapter

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13 petition (this "Case") and that *Chapter 13 Plan* (the "Plan"). See Docket Nos. 1 and 2, respectively. The Plan was confirmed on February 10, 2022, which provides for monthly plan payments of \$1,943.00 for months one through three, and of \$1,982.00 for months four through sixty, with a plan base amount of \$118,803.00. See Docket No. 22, *Order Confirming Chapter 13 Plan*.

On January 3, 2023, the Trustee filed *Chapter 13 Trustee's Notice and Motion for Order Dismissing Chapter 13 Case (Delinquency)* (the "Third MTD"), notifying the Debtor of her intent to move to dismiss this Case unless the Debtor cured a delinquency of Plan payments totaling \$3,964.00. See Docket No. 38. The Debtor filed that *Notice of Hearing and Opposition to Chapter 13 Trustee's Notice and Motion for Order Dismissing Chapter 13 Case (Delinquency)* (the "Opposition"). See Docket No. 39. Through the Opposition, it was asserted that "[t]he Debtor intends to cure the delinquent amount." *Id.* at p. 2. The Trustee voluntarily withdrew the Third MTD on May 16, 2023. See Docket No. 51.

On May 18, 2023, Matthew D. Resnik ("Resnik"), counsel of record for the Debtor, filed that *Application of Attorney for Debtor for Additional Fees and Related Expenses* (the "Application"), seeking approval of "no-look fees" of \$350.00 for addressing the Third MTD. See Docket No. 52, p. 6. In the Application, Resnik provides that "[t]he Debtor passed on November 26, 2022; her son-in-law, Brett Miles, has continued making her Plan and mortgage payments since that time." *Id.* at *Declaration of Matthew D. Resnik*, ¶ 5.

On June 7, 2023, this Court entered that *Order Setting for Hearing Application of Attorney for Debtor for Additional Fees and Related Expenses in a Pending Chapter 13 Case Subject to a Rights and Responsibilities Agreement* (the "Order"), setting the Application for hearing. See Docket No. 56. The Order read, "[t]he Debtor passed away in November 2022. Was the Court notified of the Debtor's passing? If not, must the Court make findings under Fed. R. Bankr. P. 1016 before the case may proceed?" *Id.* at p. 2.

*Analysis*

Federal Rule of Bankruptcy Procedure 1016 ("Rule 1016") provides in pertinent part that upon the death of the Debtor, "[i]f a reorganization . . . case is pending under . . . chapter 13, the case may be dismissed; or if further administration is possible and in

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the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Fed. R. Bankr. P. 1016. "[U]pon the death of a debtor, counsel for a deceased debtor should ordinarily promptly notify the Court of the debtor's death and file a motion for designation of an appropriate person to act on the debtor's behalf." *Vetter*, 2012 WL 1597378, at \*2 (Bankr. D. S.C. May 7, 2012). "Although Rule 1016 is silent on the point, effective implementation of the rule necessitates a conclusion that all parties in interest have a *duty* to inform the court of the fact of death." *In re Eads*, 135 B.R. 380 fn. 4 (Bankr. E.D. Cal. 1991).

Under Fed. R. Bankr. P. 1016, courts must determine (1) if further administration of the case is possible; (2) if such administration is in the best interest of the parties; and (3) if the case may proceed and be concluded in the same manner as though the debtor was not deceased. *See In re Sanford*, 619 B.R. 380, 392 (Bankr. E.D. Mich. 2020). "The burden to satisfy the requirements of [Rule 1016] is on the party seeking to further the administration of the bankruptcy case." *In re Goldston*, 627 B.R. 841, 865 (Bankr. D.S.C. 2021) (internal quotations omitted).

Although dismissal is not automatic, "the normal default presumption upon death is dismissal." *In re Waring*, 555 B.R. 754, 761 (Bankr. D. Colo. 2016). Chapter 13 is an "altogether different process in which the debtor plays a central and ongoing role, from the filing of the petition through discharge some three to five years later." *Id.* However, "[a]s a practical matter, in most chapter 13 cases, the death of a debtor will result in dismissal of the case because there is no future income from which to fund the debtor's plan." *In re Lizzi*, 2015 WL 1576513, at \*4 (Bankr. N.D.N.Y. Apr. 3, 2015).

Rule 1016 sets forth no procedures or requirements for any entity or individual seeking to take over the "further administration" of a deceased debtor's Chapter 13 case. At this time, Mr. Miles is seeking to continue further administration of this Case as "representative of Debtor's estate." *See* Docket No. 52, p. 5. The Court has no evidence that Mr. Miles is the legal personal representative of the Debtor. Even if Mr. Miles is the legal representative of the Debtor's estate, there has been no showing that Mr. Miles can continue in this Case through that representative capacity. *See In re Stewart*, 2004 WL 3310532, at \*2 (Bankr. D. Or. March 2, 2004) (stating that "the logical person [to be substituted for the debtor] would be a personal representative

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appointed by the State Court in the pending probate proceeding); *but see In re Shepherd*, 490 B.R. 338, 342-43 (Bankr. N.D. Ind. 2013) (because a probate estate cannot qualify as a debtor under 11 U.S.C. § 109(a), it should not be permitted to do so indirectly by substituting a representative of the probate estate for the debtor).

At bottom, disclosure of the Debtor's death was made nearly six (6) months after the Debtor's death, and only through a signature block in support of the Application. To the extent counsel had a duty to notify this Court of the Debtor's death, that duty has gone unfulfilled. The Court intends on setting issuing an order to show cause why the case should not be dismissed for the death of the Debtor and Resnik's failure to notify the Court of such.

In the meantime, the Application is denied. The Court is wholly unaware of the authority Mr. Miles has to approve of the Application or continue on in this Case as the Debtor's "representative." For all the Court is aware, Mr. Miles has no authority to act on behalf of the Debtor for any reason, and this Case should have been dismissed many months ago.

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| <b>Party Information</b> |
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**Debtor(s):**

Maureen Elva Bowen

Represented By  
Matthew D. Resnik

**Movant(s):**

Maureen Elva Bowen

Represented By  
Matthew D. Resnik

**Trustee(s):**

Elizabeth (ND) F Rojas (TR)

Pro Se



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**9:22-10934 Bonita T. Moore**

**Chapter 13**

**#16.00** CONT'D Hearing  
RE: [63] Motion for Authority to Sell or Refinance Real Property under LBR  
3015-1 (Ch 13)-No Fee

FR. 7-11-23, 8-22-23

Docket 63

**Tentative Ruling:**

**September 12, 2023**

**Appearances required.**

**August 22, 2023**

**Appearances required.**

The hearing on the Motion was originally set to be heard on July 11, 2023. Docket No. 72, *Debtor's Notice of Hearing on Motion to Refinance Real Property*. Prior to the July 11, 2023 hearing the Court issued a tentative ruling indicating that the Court was inclined to deny the Motion because the Motion was not served on all creditors as required by this Court's Local Rule ("LBR") 3015-1(x). On July 17, 2023, the Debtor filed that *Debtor's Notice of Hearing on Motion to Refinance Real Property* (the "Second Notice"). Docket No. 76. According to the Proof of Service of Document filed with the Second Notice, the "Notice of Hearing" was served upon all creditor's listed on the attached creditor matrix via U.S. Mail, first class, postage pre-paid on July 17, 2023. *Id.* at pp. 3-4.

Pursuant to LBR 3015-1(x), *all motions and applications must be served*, subject to the electronic service provisions of LBR 9036-1, on the chapter 13 trustee, debtor (and debtor's attorney, if any), and all creditors, subject to the listed exceptions, which do not apply to this case. LBR 3015-1(x) (emphasis added). Again, it does not appear to the Court that the "Motion" itself was served upon all creditors as required under LBR 3015-1(x).

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**CONT... Bonita T. Moore**

**Chapter 13**

**July 11, 2023**

**Appearances required.**

On April 24, 2023, Bonita Moore ("Moore") filed *Debtor's Motion for Authority to Refinance Real Property under LBR 3015-1(p)* (the "Motion"). See Docket No. 63. The Motion seeks approval of Moore's borrowing of \$1,200,000.00 from Fairmont Financial (the "Loan"), against that parcel of real property located at 2180 Speck Lane, Newbury Park, CA, 91320 (the "Property"). *Id.* at p. 2, ¶¶ 2-3. The Motion indicates that from the proceeds of the loan, that the following will be paid from escrow: a) Capital Benefit Mortgage Company, b) Internal Revenue Service ("IRS")- to be determined once they submit a subordination and c) NOTE: THE ESTIMATED CLOSING STATEMENT MENTIONS PAYMENTS TO LAW OFFICE OF ROBERT BASKIN, ALICE SALVO AND ANGELIQUE FRIEND- HOWEVER, THESE LIENS ARE NOT TO BE PAID SINCE MOTIONS TO AVOID JUDGMENT LIENS HAVE BEEN FILED REGARDING THESE PEOPLE. NOTE: Motion to Avoid Lien for Law Office of Robert Baskin was Granted on 5/30/2023. *Id.* at ¶ 4 (emphasis in original).

Pursuant to this Court's Local Rule 3015-1(p), "[a] sale or refinancing of the debtor's principal residence or other real property must be approved by the court. A motion to approve a sale or refinance of real property may be made by noticed motion in accordance with subsections (w) and (x) of this rule." Pursuant to this Court's Local Rule 3015-1(x), "[a]ll motions and applications must be served, subject to the electronic service provisions of LBR 9036-1, on the chapter 13 trustee, debtor (and debtor's attorney, if any), and all creditors..." Pursuant to this Court's Local Rule 3015-1(w)(1)(C), a "[m]otion for approval of sale or refinancing of debtor's residence, subject to subsection (p) of this rule [may be made by notice and opportunity to request a hearing pursuant to LBR 9013-1(o)] if the entire equity therein is exempt from the claims of creditors; provided, however, notice is not required if the sale or refinance will pay off the plan and the plan allows 100% to the unsecured claims."

Again, the proposed Loan is for \$1,200,000. The first deed of trust against the Property totals \$1,021,265.22. See Docket No. 63, *Exhibit C*. The IRS claims a secured claim against the Property in the amount of \$558,032.29. See Docket No. 47,

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**Bonita T. Moore**

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p. 2, *Debtor's Motion to Avoid Lien Under 11 U.S.C. § 522(f) (Real Property)*. Thus, the refinance will not pay Moore's claims (plan) in full.

The Motion was not served on all creditors as required by this Court's Local Rule 3015-1(x). The Court will deny the Motion without prejudice.

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| <b>Party Information</b> |
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**Debtor(s):**

Bonita T. Moore

Represented By  
Nathan A Berneman

**Movant(s):**

Bonita T. Moore

Represented By  
Nathan A Berneman

**Trustee(s):**

Elizabeth (ND) F Rojas (TR)

Pro Se

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**9:23-10145 Michael McQueen and Flavia McQueen**

**Chapter 13**

**#17.00 ORDER TO SHOW CAUSE WHY BANKRUPTCY CASE SHOULD NOT BE  
DISMISSED PURSUANT TO 11 U.S.C. § 1307(c)**

Docket 46

**Tentative Ruling:**

**September 12, 2023**

**Appearances waived.**

The Court has reviewed the *Debtors's [sic] Response to Order to Show Cause*. See Docket No. 50. The Court vacates its *Order to Show Cause Why Bankruptcy Case Should Not Be Dismissed Pursuant to 11 U.S.C. § 1307(c)*.

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| <b>Party Information</b> |
|--------------------------|

**Debtor(s):**

Michael McQueen

Represented By  
Joshua L Sternberg

**Joint Debtor(s):**

Flavia McQueen

Represented By  
Joshua L Sternberg

**Trustee(s):**

Elizabeth (ND) F Rojas (TR)

Pro Se

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**9:23-10318 Michael Moore and Marlena Moore**

**Chapter 13**

**#18.00** CONT'D Hearing  
RE: [34] Motion to Convert Case From Chapter 13 to 7. as Trustee  
(Attachments: # 1 Affidavit Declaration of Jill S. David in Support of Motion to  
Convert to Chapter 7) (David, Jill)

FR. 8-17-23

Docket 34

**Tentative Ruling:**

**September 12, 2023**

**Appearances required.**

On August 30, 2023, one or both of the Debtors filed that *Augmented Response to Creditor Richard J Moore's Objection to Claim of Exemption* (the "Response"). See Docket No. 65. Through the Response, one or both of the Debtors provide that "Debtor now files this response to Creditor's Objection to the Proof of Claim, but consents to conversion to allow the Ch. 7 Trustee to pursue the settlement funds they transferred to Steven Martindale to be held in trust for their future care and support." *Id.* at p. 5, lines 9-13.

It is the Court's understanding that the Debtors now support *Secured Creditor Richard J. Moore as Trustee's motion to Convert Chapter 13 Case to Case Under Chapter 7 of Title 11 of U.S. Code* (the "Motion"). See Docket No. 34.

The Court will grant the Motion based on the Debtors' support of the Motion, and for cause as set forth in the Motion and related exhibits.

Movant to upload an order within 7 days.

**August 17, 2023**

**Appearances waived. The Motion is denied without prejudice due to the**

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**Movant's failure to properly serve all creditors. The Movant shall lodge a conforming order within seven days.**

*Background*

On April 25, 2023 (the "Petition Date"), Michael Moore and Marlena Moore (collectively, hereinafter, the "Debtors") filed a voluntary petition for relief under Chapter 13 of Title 11 of the U.S. Code (this "Case"). *See* Docket No. 1.

The claims bar date lapsed for non-government creditors on July 5, 2023. Two secured creditors have timely filed a total of three proofs of claim: (1) Richard J. Moore, as Trustee of the Moore Marital Trust UA DTD 12/23/1986 (the "Movant"), holding a claim in the amount of \$793,152.53; (2) the Movant, holding a second claim in the amount of \$209,831.94; and (3) JPMorgan Chase Bank, N.A., holding a claim in the amount of \$196,302.85, secured by a second deed of trust against the Property. *See* Claim Nos. 3-3, 6-2, and 7-1. Three unsecured creditors have timely filed a total of four proofs of claim: (1) Wells Fargo Bank, N.A., holding an unsecured claim in the amount of \$8,208.29; (2) Wells Fargo, holding another unsecured claim in the amount of \$8,014.12; (3) LVNV Funding, LLC, holding an unsecured claim in the amount of \$4,431.34; and (4) CEP America California, holding an unsecured claim in the amount of \$123.52. *See* Claim Nos. 1-1, 2-1, 4-1, and 5-1.

Before the Court now is that *Notice of Motion and Secured Creditor Richard J. Moore as Trustee's Motion to Convert Chapter 13 Case to Case Under Chapter 7 of Title 11 of U.S. Code* (the "Motion"), filed by the Movant on July 25, 2023. *See* Docket No. 34. The Motion seeks a Court order converting this Case to a Chapter 7 case, or alternatively dismissing this Case with a bar to refiling. *See id.*

*Notice*

Fed. R. Bankr. P. 9014 governs a proceeding under 11 U.S.C. § 1307(c) to dismiss a case, or to convert a case to another chapter. *See* Fed. R. Bankr. P. 1017(f)(1); *see also* Fed. R. Bankr. P. 9014(b) ("[t]he motion shall be served in the manner provided for service of a summons and complaint by Rule 7004"). Fed. R. Bankr. P. 7004(b) provides that "service may be made within the United States by first class mail postage prepaid . . . ." Fed. R. Bankr. P. 7004(b). Notice must be provided to "the debtor, debtor's attorney (if any), all creditors, the chapter 13 trustee, any former

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trustee, and the United States trustee." LBR 3015-1(q)(3).

The Motion and notice thereof were served upon the Debtors via FedEx Overnight Mail on July 25, 2023, using the addresses listed in that *Chapter 13 Voluntary Petition*. See Docket No. 34, *Proof of Service of Document*, p. 3; see also Docket No. 1, p. 2. The Trustee, U.S. Trustee, and Debtor's counsel were each served via Notice of Electronic Filing ("NEF") on July 25, 2023. *Id.* No other parties were served. Service of the Motion and notice thereof was accordingly deficient and did not comply with Fed. R. Bankr. P. 1017(f)(1), 9014(b), and 7004(b) and this Court's Local Rule 3015-1(q)(3). The Court denies the Motion without prejudice to allow the Movant to refile and serve all creditors with the same.

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| <b>Party Information</b> |
|--------------------------|

**Debtor(s):**

Michael Moore

Represented By  
Anthony James Francisco I

**Joint Debtor(s):**

Marlena Moore

Represented By  
Anthony James Francisco I

**Movant(s):**

Richard J. Moore, as Trustee

Represented By  
Jill David

**Trustee(s):**

Elizabeth (ND) F Rojas (TR)

Pro Se

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**9:23-10318 Michael Moore and Marlena Moore**

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**#19.00** CONT'D Hearing  
RE: [15] Motion Objection to Debtors' Claims of Exemption (David, Jill)  
  
FR. 7-25-23

Docket 15

**Tentative Ruling:**

**September 12, 2023**

**Appearances waived.**

This matter is continued to October 10, 2023, at 10:00 a.m.

**July 25, 2023**

**Appearances required.**

*Background*

On April 25, 2023, Michael Moore and Marlena Moore (the "Debtors") filed a voluntary petition under Chapter 13 of Title 11 of the U.S. Code (this "Case"). *See* Docket No. 1. The Debtors' *Schedule A/B* lists property described as "Future Medical for Auto Accident Injuries" in the amount of \$1,000,000.00 (the "Settlement"). *Id.* at p. 19. On their amended *Schedule C*, the Debtors claim an exemption of the Settlement in the amount of \$1,000,000.00 pursuant to Cal. Code of Civ. P. §§ 704.140(a) and 704.150(a) (the "Exemption"). *See* Docket No. 24, p. 6.

Richard J. Moore, as Trustee of the Moore Marital Trust UA DTD 12/23/1986 (the "Creditor") has filed two secured claims in this case: (1) Proof of Claim No. 3-1, in the amount of \$793,152.53, for a judgment lien resulting from case number 30-2019-01112125-CU-BC-CJC in the Superior Court of California for the County of Orange; and (2) Proof of Claim No. 6-1, in the amount of \$209,831.94 for a matured note secured by a deed of trust against the Debtors' residential property at 2775



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Summer Ranch Road, in Paso Robles, CA. *See* Claim Nos. 3-1 and 6-1.

Before the Court is *Secured Creditor Richard J. Moore, as Trustee of the Moore Marital Trust's Objection to Claims of Exemption* (the "Objection"). *See* Docket No. 15. Through the Objection, the Creditor requests the entry of an order: (1) sustaining its objections to, and striking the Exemption; (2) that confirmation of the Debtors' proposed Chapter 13 plan be denied; (3) that the case be converted to Chapter 7; (4) alternatively, that Debtors' Chapter 13 plan be amended to reflect that the arrears listed in Creditor's Proofs of Claim Nos. 3 and 6 be paid within a period not exceeding 60 months; and (5) any other relief as this Court deems just and proper. *Id.* at p. 10.

*Notice and Service*

The Objection was filed on June 30, 2023. *See* Docket No. 15. Filed together with the Objection, is that *Notice of Motion For: Objection to Debtors' Claims of Exemption* (the "Notice"), informing parties served with the Notice that a hearing on the Objection is set for July 25, 2023. *Id.* The Notice also provides that pursuant to this Court's Local Rule 9013-1, any opposition to the Objection must be filed and served no less than fourteen (14) days prior to the hearing on the Objection, or June 11, 2023. *Id.* The Objection and the Notice were served on the date of its filing on the Debtors via U.S. Mail, and on counsel of record to the Debtors, the Office of the United States Trustee and the Chapter 13 Trustee via NEF. *Id.* at p. 3 and p. 11, *Proof of Service of Document*.

*The Debtors' Response*

On July 11, 2023, the Debtors filed *Debtor's [sic] Response to Secured Creditor Richard J. Moore, as Trustee of the Moore Marital Trust's Objection to Claims of Exemption* (the "Response"). *See* Docket No. 18.

*Analysis of the Objection*

Timeliness

Pursuant to Fed. R. Bankr. P. 4003(b)(1), an objection to the list of property claimed as exempt must be filed "within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental

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**Michael Moore and Marlena Moore**

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schedules is filed, whichever is later." In this Case, the 341(a) meeting of creditors was scheduled to be held on June 7, 2023. *See* Docket No. 6. Therefore, to the extent the Objection is an objection to the Exemption, the Objection was timely filed given the fact that it was filed within 30 days following June 7, 2023.

Legal Standard

"When a debtor files a bankruptcy petition, all of his assets become property of the estate and may be used to pay creditors, subject to the debtor's ability to reclaim specified property as exempt." *In re Elliott*, 523 B.R. 188, 192 (9th Cir. BAP 2014) (citing *Schwab v. Reilly*, 560 U.S. 770, 774, 130 S. Ct. 2652, 177 L. Ed. 2d 234 (2010)). "Section 522 provides a default list of exemptions, but allows states to opt out of the federal scheme and define their own exemptions. 11 U.S.C. §§ 522(b)(2), (b)(3)(A), (d). California has opted out of the federal exemption scheme. Cal. Civ. Proc. Code § 703.130. The bankruptcy court decides the merits of state exemptions, but the validity of the exemption is controlled by California law." *See In re Diaz*, 547 B.R. 329, 334 (9th Cir. BAP 2016) (citing *LaFortune v. Naval Weapons Ctr. Fed. Credit Union (In re LaFortune)*, 652 F.2d 842, 846 (9th Cir. 1981)).

Pursuant to Cal. Code Civ. P. § 704.150(a), "[e]xcept as provided in Article 5 (commencing with Section 708.410) of Chapter 6, a cause of action for wrongful death is exempt without making a claim."

Pursuant to Cal. Code Civ. P. § 704.140(a), "[e]xcept as provided in Article 5 (commencing with Section 708.410) of Chapter 6, a cause of action for personal injury is exempt without making a claim." Pursuant to Cal. Code of Civ. P. § 704.140(b), "[e]xcept as provided in subdivisions (c) and (d), and award of damages or a settlement arising out of personal injury is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor."

Burden of Proof

As a preliminary matter, the parties disagree on who has the burden of proof regarding the Objection. The issue is whether the burden of proof found under California law applies, or if it is Fed. R. Bankr. P. 4003 that the Court is to use. "California Code of Civil Procedure § 703.580 expressly provides that for the exemptions claimed using

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**Michael Moore and Marlena Moore**

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the California exemption scheme: [] (b) At a hearing under this section, the exemption claimant has the burden of proof." *See In re Sinclair*, 563 B.R. 554, 558 (Bankr. E.D. Cal. 2017); *see also* Cal. Code Civ. P. § 703.580(b). Pursuant to Fed. R. Bankr. P. 4003(c), "[i]n any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed." Courts have differed on the burden of proof question in this context.

The Supreme Court considered whether the burden of proof, in the context of a claim objection, is determined by reference to state law in the case of *Raleigh v. Ill. Dep't of Revenue*. In *Raleigh*, the Supreme Court held that the burden of proof should be determined by reference to state law. *See Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15 (2000).

Although *Raleigh* was decided in the context of an objection to a proof of claim and did not involve Fed. R. Bankr. P. 4003(c), some bankruptcy courts have addressed the issue of whether *Raleigh* dictates that Fed. R. Bankr. P. 4003(c) is invalid when a debtor exempts property under state law, and where state law identifies its own burden for claiming that exemption. *See, e.g., In re Diaz*, 547 B.R. 329 (9th Cir. BAP 2016); *In re Williams*, 556 B.R. 456 (Bankr. C.D. Cal. 2016); *In re Vaughn*, 558 B.R. 897 (Bankr. D. Ala. 2016); *In re Pashenee*, 531 B.R. 834 (Bankr. E.D. Cal. 2015). Other courts have concluded that Rule 4003(c) is still valid despite *Raleigh*. *See, e.g., In re Nicholson*, 435 B.R. 622 (9th Cir. BAP 2010) (partially abrogated on other grounds); *Matter of Hoffman*, 605 B.R. 560 (Bankr. N.D. Ga. 2019); *In re Weatherspoon*, 605 B.R. 472 (Bankr. S.D. Ohio 2019).

The Ninth Circuit BAP has held that "where a state law exemption statute specifically allocates the burden of proof to the debtor, Rule 4003(c) does not change that allocation." *In re Diaz*, 547 B.R. at 337. While recognizing that there is much disagreement on the issue, this Court finds the BAP's holding in *Diaz* sound. Thus, the Debtors here have the burden to prove that they are entitled to the Exemption.

Cal. Code Civ. P. § 704.150(a)

As noted *supra*, Cal. Code Civ. P. § 704.150(a) relates to wrongful death. The Response provides no response to the Objection as it relates to Cal. Code of Civ. P. § 701.150(a). *See generally*, Docket No. 18. The Response solely analyzes Cal. Code of Civ. P. 704.140. *See id.* at pp. 5-10. As there is no analysis by the Debtors as to

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their claimed exemption under Cal. Code Civ. P. § 701.150(a), the Court sustains the Objection as to this issue.

Cal. Code Civ. P. § 704.140(a)

"[T]he Debtor must meet two criteria before an exemption pursuant to CCP § 704.140 may be taken. First, the funds sought to be exempted must arise as a result of 'personal injury.' Second, the funds are only exempt 'to the extent necessary for support' of the Debtor." *In re Sylvester*, 220 B.R. 89, 91 (9th Cir. BAP 1998). Noting that the debtor's exemption rights under state law are determined as of the date of the petition, the Bankruptcy Appellate Panel for the Ninth Circuit identified factors which are relevant in determining the extent of the debtor's exemption under the "necessary for support" standard. *In re Moffat*, 119 B.R. 201, 204, n.3 (9th Cir. BAP 1990); *see also In re Altmiller-Rubio* (Bankr. E.D. Cal. Sept. 13, 2011), 2011 Bankr. LEXIS 5570 (The right to claim the exemption was determined as of commencement of the bankruptcy, but the court could look to changes in the debtors' circumstances in determining the amount of exemption to allow as necessary for their support under § 704.140(b)). Those factors included "anticipated living expenses and income; the age and health of the debtor and his or her dependents; the debtor's ability to work and earn a living; the debtor's training, job skills and education; the debtor's other assets and their liquidity; the debtor's ability to save for retirement; and any special needs of the debtor and his or her dependents." *Id.* at 206 (citation omitted). The *Moffat* court considered the debtor's assets, income, and expenses in affirming the bankruptcy court's decision. *Id.*

As discussed, the Debtor has the burden to prove these elements. This Court's Local Rule 9013-1(f)(2) provides that "[a] Response [to a motion] must be a complete written statement of all reasons in opposition thereto or in support, declarations and copies of all evidence on which the responding party intends to rely, and any responding memorandum of points and authorities."

The parties do not appear to disagree on the first prong, which is that the \$1 million referenced in the Exemption relates to a settlement received at some point by Michael Moore for a personal injury action. There is a question as to what Mr. Moore did with a part of the money, and where any remaining monies are, but that is a separate question from whether there exists, somewhere, \$1 million in proceeds of a settlement

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from a personal injury action.

As to the second prong, there is virtually no admissible evidence the Court may rely on to conduct an analysis. As the Creditor states, the Response "offer[s] only conclusory statements of 'anticipated significant future medical expenses,' including Michael Moore [is] 'almost certain to undergo spinal surgery' and Marlena Moore [is] 'awaiting confirmation of' 'potential surgery and future treatment related to her work injuries.'" See Docket No. 21, pp. 6-7. The Response was filed without any declarations in support. There are a number of factual arguments in the Response, but none of them is supported by a declaration, request for judicial notice of documents or other facts, or any other evidentiary vehicle to corroborate the statements of counsel made therein. *Exhibit A* to the Response seems to be submitted in support of Michael Moore's cognitive decline, but the Court cannot understand what *Exhibit A* means or how to interpret it. What precisely is the Court to take away from *Exhibit A* other than the apparent prescription of medicine for cognitive decline? The Response just references *Exhibit A* generally to support the Debtors' necessity for future medical care, loss of earnings, and loss of earnings capacity. See Docket No. 18, p. 5, lines 12-15. *Exhibit B* is likewise referenced in the Response as supporting the Debtors' argument as to the necessity for future medical care, loss of earnings, and loss of earnings capacity, but no *Exhibit B* is attached to the Response.

*Anticipated Living Expenses and Income of the Debtors*

Through the Response, the Debtors allege that they received a settlement for \$1,827,751 in 2018 and their medical bills included operations often costing more than \$100,000 per operation. See Docket No. 18, p. 7, lines 1-5. They further argue that conservatively estimating an average of \$50,000 per year for medical expenses, this leaves them with approximately \$1,000,000 from the settlement for medical treatment, care, and living expenses until the end of life. See *id.* at lines 2-13. The Debtors argue that they are senior citizens with a limited income, primarily from Social Security, which is insufficient to meet their monthly expenses. See *id.* at p. 6, line 28. They further argue that the cost of living continues to rise, and they anticipate significant future medical expenses. See *id.* The Response asserts that Michael Moore has a confirmed need for future physical therapy, injections, and is almost certain to undergo another spinal surgery and Marlena Moore is awaiting confirmation of potential surgery and future treatment related to her work injuries. See *id.* The

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Debtors also contend that their income is further strained by unreimbursed expenses related to the Debtors' supervision of properties in Salton City, CA. *See id.*

Again, there is no declaration or documentary evidence to support any of these statements.

Pursuant to *Schedule I*, Mr. Moore is unemployed, and the only source of his income is \$2,484.00 in monthly social security benefits and Mrs. Moore is employed, yet her monthly income consists of \$2,080.00 in "disability income" and \$643.00 in monthly social security benefits. *See* Docket No. 1, at pp. 37-38. The Debtors also allege that "[Mrs. Moore] has some injuries and she may not be able to return to work field." *Id.* at p. 41. On *Schedule J*, the Debtors list \$123.00 in monthly "medical and dental expenses." *Id.* at p. 40. The Debtors' monthly net income is \$222.32. *Id.* With \$123.00 in monthly medical expenses, the Court is unable to reconcile the claimed exemption of \$1,000,000.00 in "future medical for auto accident injuries" absent further evidentiary support. *See* Docket No. 1, p. 26. Here, the Debtors have proposed a plan lasting sixty months, based on the Debtors' proposed medical expenses of \$123.00, the amount incurred over the length of the plan should be approximately \$7,380.00. *See* Docket No. 11, p. 3. Does the evidence in other parts of the record not conflict with the Response?

*The Debtors' Age and Health*

Here, the Debtors assert that Michael Moore is 67 and Marlena Moore is 66, and that "[b]oth have significant health issues." *See* Docket No. 18, p. 7, lines 22-24. Attached to the Response as *Exhibit A* is correspondence from a David S. Ramin, M.D. indicating a diagnosis of "cognitive decline", presumably for Michael Moore as the name "Michael" is listed in the top left-hand corner but the last name and DOB are redacted. *Id.* at p.15. Again, the Court has no proof of any of these statements other than the statements that appear in the Response, which statements are not supported by declarations or other admissible evidence.

*The Debtors' Other Assets and Their Liquidity*

"In determining an exemption based upon the needs of the judgment debtor[s] . . . , the court shall take into account all property of the judgment debtor[s] . . . , including community property and separate property . . . , whether or not such property is



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subject to enforcement of the money judgment." Cal. Code Civ. Proc. § 703.115.

According to *Schedule A/B*, the Debtors have nonexempt equity in property comprising of real property located at 2450 Shore Isle Ave., Salton City, CA, 92274 (titled "Sandy"), a 2006 Dodge Ram 2500 Turbo Diesel valued at \$15,000.00, a 2003 Dodge Ram Turbo Diesel valued at \$15,000.00, a 2009 Streamline Airstream Trailer valued at \$17,000.00, a 1998 Dodge Ram 2500 Turbo Diesel valued at \$12,000.00, 1997 Dodge Ram 2500 Turbo Diesel valued at \$12,000.00 and a 1996 Dump Trailer valued at \$8,000.00. *See* Docket No. 1, pp. 10-11. In addition, the Debtors list a life insurance policy with Mutual of Omaha valued at \$20,000.00. *Id.* at p. 16.

The Debtors argue that they have limited assets, most of which are essential for their daily living or have little resale value, including older model vehicles, household items, power equipment, livestock, and personal belongings. They contend that liquidating these assets would not significantly contribute to their income but would severely impact their quality of life. *See* Docket No. 18. However, based on the representations in the Response regarding the health of the Debtors and their ability to work, what use do the Debtors have for four (4) Dodge Ram work trucks? The four trucks and the Dump trailer have a collective value of over \$60,000.00. It does not appear to the Court that it would be extremely difficult to market the vehicles for sale in today's market. Furthermore, the sale of the real property located at Shore Isle Ave would not require much effort from the Debtors besides listing the parcel on the market for sale. Based on the Debtors' Plan projections for expenses of the Debtors, it appears that they have sufficient income to meet their medical expenses, and there is value in their non-exempt assets to pay their medical costs for the foreseeable future that exceed the projected expenses.

*The Debtors' Ability to Work and Earn a Living*

The Response asserts that the Debtors "are unable to work due to their health conditions." *See* Docket No. 18, p. 9, lines 8-9. However, Marlene Moore's "ability to work is uncertain pending recovery from her injuries..." *Id.* at lines 9-10. Taking these statements as true, and admissible, it is wholly unclear to the Court what Merlene Moore's earning capacity is. At present, it appears she cannot work, but the Response does not make it clear when she would be able to work post-surgery, and what her earning capacity would be.

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*The Debtors' Ability to Save for Retirement*

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The Response provides that the Debtors' "only retirement savings are the proceeds from their 2016 car accident and their Social Security income." *See* Docket No. 18, p. 10, lines 14-16. This, however, does not include what Marlene Moore's earning potential in the future post-surgery could add to the Debtors' monthly net income budget.

*Special Needs of the Debtors*

The Response provides that "[b]oth debtors are certain to need specialized elderly care in the future, as Michael has severe cognitive decline that is only worsening." *See* Docket No. 18, p. 10, lines 26-28. This statement is completely unsupported, and gives the Court no understanding of what the specialized elderly care actually is, what it would cost, and when it would be required.

The Court simply has little to no evidence that can be used in an analysis under Cal. Code Civ. P. § 704.140 other than the information it can glean from the Debtor's schedules and the Debtor's proposed plan of reorganization. The Debtors' schedules and plan provide a picture that is much different than what the Response provides in terms of what money they require monthly for medical needs.

Without more evidence, the Court is inclined to sustain the Objection.

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| <b>Party Information</b> |
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**Debtor(s):**

Michael Moore

Represented By  
Anthony James Francisco I

**Joint Debtor(s):**

Marlena Moore

Represented By  
Anthony James Francisco I

**Movant(s):**

Richard J. Moore, as Trustee

Represented By  
Jill David



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**Trustee(s):**

Elizabeth (ND) F Rojas (TR)

Pro Se

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**9:22-10674 John E King**

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**#20.00** CONT'D Hearing  
RE: [112] Motion to Quash with proof of service

FR. 8-22-23

Docket 112

**Tentative Ruling:**

**August 22, 2023**

**Appearances required.**

On July 31, 2023, John E. King ("King") filed that *Motion to Quash*. (the "Motion"). See Docket No. 112. Through the Motion, King requests that the Court quash the 155 subpoenas for production of documentation listed in *Exhibit A* attached to the Motion (the "Subpoenas"). *Id.* at p. 2, lines 14-21. King argues that Wolverine Endeavors VIII, LLC ("Wolverine") violated multiple provisions of Fed. R. of Civ. P. 45 ("Rule 45") regarding the service, location, timing, and breadth of the Subpoenas. *Id.* pp. 3-4. Accordingly, the Motion further requests that the Court grant monetary sanctions to King against Wolverine, Casey Z. Donovan, Wilson Elser, and Moskowitz Edelman & Dicker LLP in a minimal amount of \$5,635.00, 9.8 hours at \$575.00 per hour, the purported amount of time billed by King's counsel of record for services associated with the Subpoenas. *Id.* at p. 7. King also requests that the Court grant monetary sanctions to the recipients of the Subpoenas. *Id.* at p. 8.

On August 8, 2023, Wolverine filed *Petitioning Creditor's Limited Opposition to Alleged Debtor's Motion to Quash* (the "Opposition"). Docket No. 118. In the Opposition, Wolverine states that although it believes it has remedied its technical violations of Rule 45, such that neither King nor the subpoenaed parties have been prejudiced, it agrees to withdraw the Subpoenas and re-serve them in strict compliance with Rule 45, *et seq.* *Id.* at p. 2.

On August 9, 2023, Apple Turnover LLC, The Bear and The Bull LLC, Fresno Pacific Towers, Inc., Full Glass Productions, Inc., HKH Partners, HRGC, Inc., Inn at Morro Bay, LLC, King Coastal Properties, LLC, Kingcorp, Larking Group Inc.,

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Margarita Annex LLC, Marine Collection LLC, Nipomo Center, LLC, Oak Bay, Tract 720, Phase II, LLC, Oyster Point Hospitality Services, Pharma CBD LLC, RSI Partners LP, RX CBD LLC, SLO Heritage Group, LLC, Spanish Springs II LLC, Spanish Springs LLC, Spanish Springs North Ranch LLC, Tubs 2 Go, Inc., Two Bunch Palms LLC, Vaquero de los Robles, LLC, The Bluffs Group III, Oyster Point Marina Inn, Big Hat No Cattle, LLC, Black Chaps LLC, Bluffs Group N, Boutique Hotel Collection, Inc., Buena Vista Group, HREE, Inc., Mission Grove Associates, Montalban Street Group, Napa River Inn, Oak Shores Group LLC, Oak Shores II, LP, Oyster Point Inn II, LLC, Palm Dunes LLC, SMS Resorts, Inc., and The Bluffs Group III, LLC filed that *Notice of Joinder and Joinder in Debtors' Motion to Quash Subpoenas*. See Docket No. 121. On the same date, that *Notice of Joinder and Joinder in Debtors' Motion to Quash Subpoenas* was filed by RKO, Ruidoso Associates, LLC, Rossi King Enterprises, A California Limited Partnership, Orka Real Estate Partners LLC, Sperry Flour LLC, and Chumash Hill Properties, Inc. See Docket No. 122, and together with Docket No. 121, the "Joinders."

On August 10, 2023, that *Petitioning Creditor's Notice of Withdrawal of Subpoenas* was filed by Wolverine, withdrawing the Subpoenas. See Docket No. 124.

The withdrawal of the Subpoenas moots the request that the Subpoenas be quashed. As the Subpoenas have been withdrawn, there is nothing for this Court to quash. It appears the only issue remaining is whether monetary sanctions should be levied against Wolverine, Casey Z. Donovan, Wilson Elser, and Moskowitz Edelman & Dicker LLP, and in favor of King and the parties to the Joinders. As to the parties to the Joinder, it is not clear what their sanction requests consist of, and so, due to lack of any evidence under Fed. R. Civ. P. 45(d)(1) or otherwise, the request is denied without prejudice. As to King's request for sanctions, King has not complied with this Court's Local Rule 7026-1(c). The Court, therefore, denies King's request for monetary sanctions.

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| <b>Party Information</b> |
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**Debtor(s):**

John E King

Represented By  
William C Beall  
Carissa N Horowitz

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**Movant(s):**

John E King

Represented By  
William C Beall  
Carissa N Horowitz

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**#21.00 CONT'D Hearing**

RE: [101] Motion to compel discovery responses from Fence Factory, Inc., with proof of service (Beall, William)

FR. 8-8-23, 8-22-23

Docket 101

**Tentative Ruling:**

**September 12, 2023**

**Appearances required.**

On August 31, 2022, Wolverine Endeavors VIII, LLC ("Wolverine") filed that *Involuntary Petition Against an Individual* (the "Petition"). See Docket No. 1. On October 5, 2022, John E. King ("King") filed that *Motion to Dismiss Involuntary Petition* (the "Motion to Dismiss") seeking dismissal of the Petition, in part, because the Petition was filed "with only one creditor," and King argues that he has "at least 12 holders of claims." See Docket No. 24, pp. 3-4. Thus, argues King, the involuntary petition must be dismissed pursuant to 11 U.S.C. § 303(b)(1). See *id.*

On May 12, 2023, Fence Factory, Inc. ("Fence") filed that *Joinder to Involuntary Petition by Additional Petitioning Creditor* (the "Joinder"), joining the Petition. See Docket No. 82. On September 7, 2023, Fence filed that *Withdrawal of Joinder to Involuntary Petition* (the "Withdrawal") seeking to "withdraw its Joinder [as it] no longer wishes to participate in the instant involuntary bankruptcy." See Docket No. 139.

*Fence's Notice of Withdrawal*

Fence has not moved this Court to grant its request to withdraw from this matter apart from filing the Withdrawal. "Courts have held as a general rule that if a creditor is an eligible petitioning creditor, that creditor cannot withdraw if its withdrawal would result in the defeat of the involuntary petition." *In re Elshub Corp.*, 70 B.R. 797, 809 (Bankr. D. N.J. 1987)(citing *Sheehan & Egan, Inc. v. North Eastern Shoe Co.*, 47 F.2d

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487 (1st Cir. 1931); *In re Ross*, 63 B.R. 951, 962 (Bankr. S.D.N.Y. 1986); *In re Claxton*, 21 B.R. 905 (Bankr. E.D. Va. 1982). "A bankruptcy court's exercise of discretion over a creditor's voluntary withdrawal of claims is reviewed for abuse of discretion." *In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057, 1064 (9th Cir. 2002).

The Court is inclined to set an in-person hearing, noticed to all creditors, on the Withdrawal. The hearing will take place the same date and time as the evidentiary hearing on the Motion to Dismiss. Fence is to provide written notice of the hearing on the Withdrawal to all creditors, the alleged debtors, and the Office of the United States Trustee on or before September 13, 2023 in conformance with this Court's Local Rule 9013-1(d).

*Motion to Compel*

On July 12, 2023, King filed that *Motion to Compel Discovery Responses from Fence Factory, Inc.* (the "Motion to Compel"). See Docket No. 101. The Motion to Compel relates to Fence's refusal to respond to certain questions on behalf of King at Fence's deposition on the grounds of attorney-client privilege and relevance, and responses to written discovery served by King on Fence on the bases of privilege and relevance. To the extent the parties have not resolved the Motion to Compel, the below analysis applies.

"The party asserting an evidentiary privilege has the burden to demonstrate that the privilege applies to the information in question." *Tornay v. U.S.*, 840 F.2d 1424, 1426 (9th Cir. 1988)(citing *U.S. v. Hirsch*, 803 F.2d 493, 496 (9th Cir. 1986)). "The purpose of the attorney-client privilege is to encourage full disclosure to attorneys so they are able to render effective legal assistance." *Id.* (citing 8 J. Wigmore, *Evidence* §§ 2291-92 (McNaughton rev. 1961)). "Accordingly, it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." *Id.* (citing *Fisher v. U.S.*, 425 U.S. 391, 403 (1976)). "[The Ninth Circuit has] said repeatedly [] that fee information generally is not privileged." *Id.* (internal citations omitted). "Payment of fees is incidental to the attorney-client relationship, and does not usually involve disclosure of confidential communications arising from the professional relationship." *Id.* (internal citations omitted).

Courts have held that the attorney-client privilege "does not protect the identity of a

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‘benefactor’ so far as legal fees are concerned." *In re Shargel*, 742 F.2d 61, 64 (2nd Cir. 1984). "The payment of another's legal fee is an act independent of that explanation and should not be accorded more protection against disclosure under the attorney-client privilege than a payment directly to the person for purposes of his or her retaining a lawyer. Whatever legal result might flow from application of the incrimination rationale, the view of the privilege we adopt thus denies protection to evidence indicating payment of one person's legal fees by another." *Id.* at 64-65.

As to the questions at issue from Fence’s deposition, the questions are whether Fence "hire[d] Mr. Katz," and whether Fence "pay[s] Mr. Katz." *See* Docket No. 101, pp. 2-3. Katz refers to Katz Law, APC, Fence’s counsel of record. Whether Katz represents Fence in this matter is known by the fact that Katz is counsel of record to Fence. Which party, Fence and/or a third party that pays Katz on behalf of Fence is not protected by the attorney-client privilege, and is to be answered by Fence.

As to the document production, the incomplete, redacted and/or withheld responses appear to rely on attorney-client privilege and common interest privilege. *See* Docket No. 109, pp. 9-12.

"The common-interest doctrine is not an independent privilege. Rather, is ‘a narrow exception to the general rule that disclosing information to a third party constitutes a waiver of the attorney-client privilege.’" *Rodriguez c. Seabreeze Jetlev LLC*, 620 F.Supp.1009, 1019 (N.D. Cal. 2022)(internal citations omitted). "To successfully invoke the doctrine, the party asserting the privilege must show: ‘(1) the communication is made by separate parties in the course of a matter of common interest; (2) the communication is designed to further that effort; and (3) the privilege has not been waived.’" *Id.* (citing *U.S. v. Bergonzi*, 216 F.R.D. 487, 495 (N.D. Cal. 2003)). "The parties [] must have a ‘common legal, as opposed to commercial interest.’" *Id.* (internal citations omitted). "In this respect, ‘a shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within this exception.’" *Id.* (internal citations omitted). "Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement—whether written or unwritten." *Id.*

Fence argues that "[i]n this case, there is clearly a ‘common interest’ between the joint petitioning creditors. To put it simply, the ‘common interest’ is obtaining the ‘order

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for relief' in this involuntary bankruptcy.'" See Docket No. 109, p. 11, lines 3-6. Fence has not joined in any opposition to the Motion to Dismiss, or litigated the Motion to Dismiss in any way. Assuming for the moment that Fence is a creditor of King, it is seeking entry of an order for relief so it may be paid on that claim. This constitutes a commercial interest. The Court has no understanding of what the agreement is between Fence and Wolverine regarding the purported common legal interest. Emails between Lior Katz and Brett Ramsaur relate to "case strategy." See *id.* at *Exhibit A*, pp. 1-2. It is not clear at all what "case strategy" means. Is this the underlying bankruptcy case in general? Again, Fence has not taken a position on the Motion to Dismiss. Other emails between Lior Katz and Brett Ramsaur relate to the deposition of Fence's person most knowledgeable. See *id.* at p. 2. The Court remains confused as to why these emails constitute a common privilege. The depositions focused on whether Fence was a creditor of King, and why Fence joined the involuntary petition. The Court will hear from Fence on why the above-referenced emails are privileged.

**August 22, 2023**

**Appearances required.**

**August 8, 2023**

**Appearances required.**

On July 12, 2023, John E. King ("King") filed that *Motion to Compel Discovery Responses from Fence Factory, Inc.* (the "Motion"). See Docket No. 101. At bottom, King seeks a continued deposition of the principal of Fence Factory, Inc. ("Fence") "to answer the questions and follow-up questions" regarding the employment and payment of counsel to Fence, as well as further responses to written discovery requests.

Pursuant to this Court's Local Rule 7026-1(c)(2), "[p]rior to the filing of any motion relating to discovery, the parties must meet in person or by telephone in a good faith



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effort to resolve a discovery dispute. It is the responsibility of the moving party to arrange the conference. Unless altered by agreement of the parties or by order of the court for cause shown, the opposing party must meet with the moving party within 7 days of service upon the opposing party of a letter requesting such meeting and specifying the terms of the discovery order to be sought."

Pursuant to this Court's Local Rule 7026-1(c)(3):

If the parties are unable to resolve the dispute, the party seeking discovery must file and serve a notice of motion together with a written stipulation by the parties. (A) The stipulation must be contained in 1 document and must identify, separately and with particularity, each disputed issue that remains to be determined at the hearing and the contentions and points and authorities of each party as to each issue. (B) The stipulation must not simply refer the court to the document containing the discovery request forming the basis of the dispute. For example, if the sufficiency of an answer to an interrogatory is in issue, the stipulation must contain, verbatim, both the interrogatory and the allegedly insufficient answer, followed by each party's contentions, separately stated. (C) In the absence of such stipulation or a declaration of a party of noncooperation by the opposing party, the court will not consider the discovery motion.

The Court continues its search for a copy of a letter from King's counsel requesting a meet and confer with Fence's counsel about the Motion, and which letter requests a meeting, by telephone or in-person, within 7 days in conformance with this Court's Local Rule 7026-1(c)(2). The Court continues its search for a copy of the stipulation required under this Court's Local Rule 7026-1(c)(3). The Court declines to hear the Motion until it receives proof that its Local Rule 7026-1(c) has been fully complied with.

The Court will note that Fence appears to misunderstand this Court's policy on appearances in front of this Court. This Court does not require remote appearances. In-fact, this Court welcomes in-person appearances on any case, for any reason, both by parties to the case and the public. The Court is presently hearing matters live in the Ronald Reagan Federal Courthouse in Santa Ana, as its tentative rulings page informs parties, but that has not prevented parties from appearing for hearings in-person.

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**CONT...**

**John E King**

**Chapter 7**

**Party Information**

**Debtor(s):**

John E King

Represented By  
William C Beall  
Carissa N Horowitz

**Movant(s):**

John E King

Represented By  
William C Beall  
Carissa N Horowitz

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**9:23-10157 Baron Brothers Nursery, Inc.**

**Chapter 7**

**#22.00 CONT'D Hearing**

RE: [87] Motion For Sale of Property of the Estate under Section 363(b) - No Fee Chapter 7 Trustees Motion for Order: (1) Authorizing Sale of Personal Property Free and Clear of all Liens, Claims, and Interests Pursuant To 11 U.S.C. § 363(B) and (F); (2) Approving Overbid Procedures; (3) Approving Purchaser, Successful Bidder, and Back-Up Bidder as Good Faith Purchasers; and (4) Waiving the 14 Day Stay; Memorandum of Points and Authorities; and Declaration in Support Thereof (Boyamian, Samuel)

FR. 8-8-23

Docket 87

**Tentative Ruling:**

**September 12, 2023**

**Appearances required.**

*Background*

On March 6, 2023, Baron Brothers Nursery, Inc. (the "Debtor"), which operated commercial and retail nurseries, filed a voluntary petition under Chapter 7 of Title 11 of the U.S. Code (this "Case"). See Docket No. 1; see also Docket No. 87, p. 5. Sandra K. McBeth was subsequently appointed as the duly qualified and acting Chapter 7 Trustee (the "Trustee") of the Debtor's bankruptcy estate (the "Estate"), in which capacity she continues to serve.

On July 18, 2023, the Trustee filed that *Chapter 7 Trustee's Motion for Order: (1) Authorizing Sale of Personal Property Free and Clear of All Liens, Claims, and Interests Pursuant to 11 U.S.C. § 363(b) and (f); (2) Approving Overbid Procedures; (3) Approving Purchaser, Successful Bidder, and Back-Up Bidder as Good Faith Purchasers; and (4) Waiving the 14 Day Stay* (the "Motion"), as well as that *Notice of Hearing of Chapter 7 Trustee's Motion for Order* (the "Notice"). See Docket Nos. 87 and 89.

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The Trustee seeks Court approval to sell the Assets free and clear of the liens, interests, and encumbrances in favor of (1) WOWater, Inc. ("WOWater"); (2) Velocity Group USA ("Velocity"); (3) the United States Small Business Administration (the "SBA"); (4) the United States Department of Agriculture Farm Services Agency (the "USDA"); and (5) the California Department of Tax & Fee Administration (the "CDTFA") (collectively, the "Lienholders"). *Id.* at pp. 12-13. The Trustee is informed and believes that WOWater holds a lien on the Assets based on a pre-judgment writ of attachment. *Id.* at p. 12. The following lienholders are alleged to hold blanket liens on the Assets: (1) Velocity, in the approximate amount of \$20,000.00; (2) the SBA, in the approximate amount of \$164,541.26; and (3) the USDA, in the approximate amount of \$168,000.00. *Id.* at pp. 12-13. The Trustee also believes that the CDTFA has recorded two tax liens, which attach to the Assets in the approximate amount of \$70,026.50. *Id.* at p. 13.

The hearing on the Motion was originally set to be heard on August 8, 2023. Docket No. 91. Prior to the August 8, 2023 hearing the Court issued a tentative ruling indicating that the Court was inclined to deny the Motion because service of the Motion upon WOWater and Velocity did not comply with Fed. R. Bankr. P. 7004(b)(3), service of the Motion upon the Debtor did not comply with Fed. R. Bankr. P. 7004(b)(9), service of the Motion upon the CDTFA did not comply with Fed. R. Bankr. P. 7004(b)(6), and service of the Motion upon the SBA and USDA did not comply with Fed. R. Bankr. P. 7004(b)(5).

At the August 8, 2023 hearing on the Motion, the Trustee, counsel for the Trustee Jeremy Faith and creditors SBA and WOWater appeared on the record. The Court approved the sale as to (i) one 1986 Western Star 3 Axle Crane Truck; (ii) one 1999 International Crane Truck; (iii) one 1981 Great Dane Drop-Deck trailer; (iv) one 1968 Kentucky Lowboy Drop-Deck trailer. Docket No. 97. The Court continued the hearing to August 22, 2023 as to the sale of the one 10x6 foot potting wagon (the "Potting Wagon") to allow the Movant to properly serve the Motion on all secured creditors who may assert a lien in the Potting Wagon. *Id.*

On August 14, 2023, the Trustee filed that *Notice of Continued Hearing on Chapter 7 Trustee's Motion for Order: (1) Authorizing Sale of Perishable Plant Inventory Free and Clear of All Liens, Claims, and Interests Pursuant to 11 U.S.C. § 363(b) and (f); (2) Approving Overbid Procedures; (3) Approving Purchaser, Successful Bidder, and*

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**CONT... Baron Brothers Nursery, Inc.**

**Chapter 7**

*Back-Up Bidder as Good Faith Purchasers; and (4) Waiving the 14 Day Stay* (the "Second Notice"). Docket No. 96. The title of the Second Notice is incorrect, but the body of the Second Notice and *Exhibit A* to the Second Notice are correct.

The Second Notice was served via U.S. Mail First Class, postage prepaid on August 14, 2023, upon secured creditors Wowater, USDA, SBA, CDTFA and Velocity Funding Group, in addition to all creditors listed on the Debtor's creditor matrix. *Id.* at pp. 20-26, *Proof of Service of Document*.

The Motion is approved as to the sale of the potting wagon on the terms set forth in the Motion.

The Trustee is to upload a confirming order within 7 days.

**August 8, 2023**

**Appearances waived. The Motion is denied for the reasons stated *infra*. The Trustee is to upload a conforming order within seven days.**

*Background*

On March 6, 2023, Baron Brothers Nursery, Inc. (the "Debtor"), which operated commercial and retail nurseries, filed a voluntary petition under Chapter 7 of Title 11 of the U.S. Code (this "Case"). *See* Docket No. 1; *see also* Docket No. 87, p. 5. Sandra K. McBeth was subsequently appointed as the duly qualified and acting Chapter 7 Trustee (the "Trustee") of the Debtor's bankruptcy estate (the "Estate"), in which capacity she continues to serve.

On July 18, 2023, the Trustee filed that *Chapter 7 Trustee's Motion for Order: (1) Authorizing Sale of Personal Property Free and Clear of All Liens, Claims, and Interests Pursuant to 11 U.S.C. § 363(b) and (f); (2) Approving Overbid Procedures; (3) Approving Purchaser, Successful Bidder, and Back-Up Bidder as Good Faith Purchasers; and (4) Waiving the 14 Day Stay* (the "Motion"), as well as that *Notice of Hearing of Chapter 7 Trustee's Motion for Order* (the "Notice"). *See* Docket Nos. 87 and 89. The Motion seeks an order authorizing the sale of the following assets, all belonging to the Estate: (i) one 1986 Western Star 3 Axle Crane Truck; (ii) one 1999

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**Baron Brothers Nursery, Inc.**

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International Crane Truck; (iii) one 1981 Great Dane Drop-Deck trailer; (iv) one 1968 Kentucky Lowboy Drop-Deck trailer; and (v) one 10x6 foot potting wagon (collectively, the "Assets"), which are located at 8860 Stockton Road, Moorpark, California 93021, one of the Debtor's commercial nursery sites (the "Stockton Site"). See Docket No. 87, p. 25. The Trustee also filed that *Notice of Sale of Estate Property* (the "Notice of Sale") and that *Declaration of Jonathan Sabag in Support of Chapter 7 Trustee's Motion* (the "Purchaser's Declaration") on July 18, 2023. See Docket Nos. 88 and 90.

The Trustee seeks Court approval to sell the Assets free and clear of the liens, interests, and encumbrances in favor of (1) WOWater, Inc. ("WOWater"); (2) Velocity Group USA ("Velocity"); (3) the United States Small Business Administration (the "SBA"); (4) the United States Department of Agriculture Farm Services Agency (the "USDA"); and (5) the California Department of Tax & Fee Administration (the "CDTFA") (collectively, the "Lienholders"). *Id.* at pp. 12-13. The Trustee is informed and believes that WOWater holds a lien on the Assets based on a pre-judgment writ of attachment. *Id.* at p. 12. The following lienholders are alleged to hold blanket liens on the Assets: (1) Velocity, in the approximate amount of \$20,000.00; (2) the SBA, in the approximate amount of \$164,541.26; and (3) the USDA, in the approximate amount of \$168,000.00. *Id.* at pp. 12-13. The Trustee also believes that the CDTFA has recorded two tax liens, which attach to the Assets in the approximate amount of \$70,026.50. *Id.* at p. 13.

The Trustee received an offer from JAS Plants Sales, Inc. (the "Purchaser") to purchase the Assets for a total price of \$42,430.00 (\$15,695 for each Truck, \$5,000 for each Drop-Deck, and \$500 for the Potting Wagon), and accepted the offer subject to overbid and Court approval. *Id.* at pp. 5-6. The Purchaser paid an initial deposit of \$42,430.00 (the "Purchase Price"), which the Trustee is currently holding in a segregated account pending Court approval of the sale. *Id.* at p. 7. The Sale is "as-is," "where-is," "with all faults," and without any representations or warranties of any kind and is not subject to any contingencies. *Id.*

*Notice*

Pursuant to this Court's Local Rule 6004-1, "an order authorizing the sale of estate property other than in the ordinary course of business may be obtained upon motion of the trustee . . . after notice and a hearing pursuant to LBR 9013-1(d) . . . ." LBR

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6004-1(c)(1). Service of such a motion upon creditors with a direct pecuniary interest in said property must comply with Fed. R. Bankr. P. 9014(b). *See* Fed. R. Bankr. P. 6004(c) ("A motion for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold"); *see also* Fed. R. Bankr. P. 9014(b) ("The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004"); *In re Metzger*, 346 B.R. 806, 815 (Bankr. N.D. Cal. 2006) ("Rule 6004(c) provides that a motion for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold. . . . A motion is to be served in the manner of serving a summons and complaint by Rule 7004"); *see also In re Ex-Cel Concrete Co., Inc.*, 178 B.R. 198, 202-03 (9th Cir. BAP 1995) (same).

The Motion was served upon the Debtor via U.S. Mail First Class, postage prepaid on July 18, 2023, to the attention of Richard Baron, the Debtor's President, using the following address: "P.O. Box 25 / Somis, CA 93066." *See* Docket No. 87, *Proof of Service of Document*, p. 30. The Debtor's mailing address is 7568 Santa Rosa Road, Camarillo, California 93012. *See* Docket No. 1, p. 1. The Motion and Notice were served upon the Lienholders via email on July 18, 2023. *See* Docket No. 87, p. 31; *see also* Docket No. 89, *Proof of Service of Document*, p. 10. None of the Lienholders have requested to be added to this Court's courtesy Notification of Electronic Filing ("NEF"). Furthermore, the Court is concerned that the email address used to serve WOWater contained a typo: the Motion and Notice were served upon "aronldsandlow@gmail.com," which was likely supposed to read "arnoldsandlow@gmail.com." *Id.*; *see also* Docket No. 89, *Proof of Service of Document*, p. 10. The Notice was served upon the Debtor and all creditors, including the Lienholders but excluding WOWater, via U.S. Mail First Class, postage prepaid on July 18, 2023. *See* Docket No. 89, *Proof of Service Document*, p. 9. Service of the Motion upon WOWater and Velocity did not comply with Fed. R. Bankr. P. 7004(b)(3), service of the Motion upon the Debtor did not comply with Fed. R. Bankr. P. 7004(b)(9), service of the Motion upon the CDTFA did not comply with Fed. R. Bankr. P. 7004(b)(6), and service of the Motion upon the SBA and USDA did not comply with Fed. R. Bankr. P. 7004(b)(5). Without proper assurance that the Lienholders were afforded due process, the Court cannot grant the Trustee the relief requested in the Motion.



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**Chapter 7**

Pursuant to this Court's Local Rule 6004-1(f), "[w]henver the trustee . . . is required to give notice of a sale or of a motion to sell property of the estate pursuant to FRBP 6004 and 2002(c), an additional copy of the notice and court-approved form F 6004-2.NOTICE.SALE, Notice of Sale of Estate Property must be submitted to the clerk at the time of filing for purposes of publication by the clerk on the court's website." LBR 6004-1(f). The Trustee filed the Notice of Sale, using the Court's form F 6004-2.NOTICE.SALE, to be served by the Court via NEF on July 18, 2023. *See* Docket No. 90, *Proof of Service of Document*, pp. 13-14. The Notice of Sale was posted to the Office of the Clerk's website on July 18, 2023, with a listed sale date of August 8, 2023.

Pursuant to this Court's Local Rule 6004-1(b)(2), relating to bidding procedures, notice of a motion to establish such procedures must "include a copy of the proposed purchase agreement" and "describe the marketing efforts undertaken and the anticipated marketing plan, or explain why no marketing is required." The Notice does not include a copy of the proposed purchase agreement or a description of marketing efforts.

Analysis

*11 U.S.C. § 363(b)(1)*

11 U.S.C. § 363(b)(1) allows a trustee to sell property of the estate, other than in the ordinary course of business, after notice and a hearing. *See* 11 U.S.C. § 363(b)(1). For the "trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business." *In re Walter*, 83 B.R. 14, 19 (9th Cir. BAP 1988). Whether the articulated business justification is sufficient "depends on the case," in view of "all salient factors pertaining to the proceeding." *Id.* at 19-20. In approving such a sale, the court must also find "it is in the best interest of the estate, i.e. it is fair and reasonable, that it has been given adequate marketing, that it has been negotiated and proposed in good faith, that the purchaser is proceeding in good faith, and that it is an 'arms-length' transaction." *In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991). "The court's obligation in § 363(b) sales is to assure that optimal value is realized by the estate under the circumstances." *In re Lahijani*, 325 B.R. 282, 288 (9th Cir. BAP 2005).



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Initially, the Court notes that a motion for an order authorizing the sale of estate property "must be supported by a declaration of the movant establishing the value of the property and that the terms and conditions of the proposed sale, including the price and all contingencies, are in the best interest of the estate." LBR 6004-1(c)(2)(A). Although the Trustee did include a declaration within the Motion, it did not establish the value of the Assets or that the sale is in the best interest of the Estate. *See* Docket No. 87, pp. 17-23. Furthermore, the Motion contains scant evidence of the marketing of the Assets. The Purchaser's Declaration, however, provides that "[t]he sale was negotiated at arms' length negotiations." Docket No. 88, p. 3.

What is more, the sale price of each Asset disclosed in the Motion does not total the Purchase Price. The total of the Assets in the Notice and Motion is \$41,890, but the Purchase Price is \$42,430. *See* Docket No. 87, p. 14; *see also* Docket No. 89, p. 4.

*11 U.S.C. § 363(f)*

Pursuant to 11 U.S.C. § 363(f), the trustee may sell property under section 363(b) "free and clear of any interest in such property of an entity other than the estate, only if . . . (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; [or] (4) such interest is in bona fide dispute . . . ." 11 U.S.C. § 363(f).

The Trustee seeks to sell the Assets free and clear of WOWater's lien as being subject to a bona fide dispute pursuant to 11 U.S.C. § 363(f)(4), with said lien, if any, attaching to the net sale proceeds. *See* Docket No. 87, p. 12. WOWater commenced litigation against the Debtor in the Superior Court of California for the County of Los Angeles in the matter of *WOWater, Inc. v. Baron Brothers Nursery, Inc., et al.*, case number 19STCV40877. *Id.* Accordingly, WOWater's claim is unliquidated and contingent. *Id.* A bona fide dispute exists if there is "an objective basis for either a factual or a legal dispute" as to an interest in property of the estate. *In re Vortex Fishing Sys., Inc.*, 277 F.3d 1057, 1064 (9th Cir. 2002). The Court finds that WOWater's lien, based on a pre-judgment writ of attachment, satisfies section 363(f)(4)'s criterion, and that the Assets may be sold free and clear of WOWater's lien.

The Trustee seeks to sell the Assets free and clear of the remaining Lienholders' liens with the Lienholders' consent pursuant to 11 U.S.C. § 363(f)(2), with each lien to attach to the net sale proceeds. *See* Docket No. 87, pp. 21-22. It appears that the

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**CONT... Baron Brothers Nursery, Inc.**

**Chapter 7**

Trustee has not obtained the affirmative consent of the Lienholders, and instead asserts that the Lienholders' "silence shall be deemed consent to the sale being free and clear of its lien." *Id.* at p. 13 (citing *In re Haven Eldercare*, 390 B.R. 762, 771 (Bankr. D. Conn. 2008)). However, as was the case in *Ex-Cel Concrete*, the Trustee failed to serve the Lienholders pursuant to Fed. R. Bankr. P. 7004(b), and "elementary principles of due process of law require that [they] receive notice before [they] may be deprived of [their] interest[s] in the Debtor's property." *Ex-Cel Concrete*, 178 B.R. at 205 (quoting *In re Fernwood Markets*, 73 B.R. 616, 620 (Bankr. E.D. Penn. 1987)). The Assets may not be sold free and clear of the liens held by Velocity, the SBA, the USDA, or the CDTFA, as they were not afforded due process of law and did not have a fair opportunity to object to the sale.

|                          |
|--------------------------|
| <b>Party Information</b> |
|--------------------------|

**Debtor(s):**

Baron Brothers Nursery, Inc.

Represented By  
William E. Winfield

**Movant(s):**

Sandra McBeth (TR)

Represented By  
Samuel Mushegh Boyamian  
Jeremy Faith

**Trustee(s):**

Sandra McBeth (TR)

Represented By  
Samuel Mushegh Boyamian  
Jeremy Faith

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**9:23-10174 Jonathan Alan Stein**

**Chapter 7**

**#23.00 CONT'D Hearing**

RE: [65] Motion to Approve Compromise Under Rule 9019 Chapter 7 Trustee's Motion to Approve Compromise with Gabrielino-Tongva Tribe with Proof of Service (Masud, Laila)

FR. 7-25-23

Docket 65

**Tentative Ruling:**

**September 12, 2023**

**Appearances waived. The hearing on the Motion is continued to September 26, 2023, at 2:00 p.m.**

On September 5, 2023, the Court entered that *Order Approving Stipulation to (1) Continue Hearing Date On Trustee's Motion to Approve Compromise; and (2) Extend Debtor's Deadline to File Supplemental Brief or Further Opposition to Trustee's Motion to Approve Compromise* through which the Court continued the hearing on the Motion to September 26, 2023, at 2:00 p.m. See Docket No. 119.

**July 25, 2023**

**Appearances required.**

|                          |
|--------------------------|
| <b>Party Information</b> |
|--------------------------|

**Debtor(s):**

Jonathan Alan Stein

Represented By

David B Golubchik

Anthony A. Friedman

**Movant(s):**

Jerry Namba (TR)

Represented By

Laila Masud

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**CONT... Jonathan Alan Stein**

**Chapter 7**

**Trustee(s):**

Jerry Namba (TR)

Represented By  
Laila Masud

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**9:22-10622 Alcaraz Catering, Inc.**

**Chapter 11**

**#24.00 Post-Confirmation Status Conference**

Docket 181

**Tentative Ruling:**

**September 12, 2023**

**Appearances required.**

On May 8, 2023, the Debtor's third amended chapter 11 plan of reorganization (the "Plan") was confirmed. Docket Nos. 149 and 175, respectively. On May 25, 2023, that *Notice of Post Confirmation Status Conference* (the "Notice"), set to be held on September 12, 2023 was filed. Docket No. 181. The Notice indicated that the Debtor must file a Status Report 14 days prior to the Status Conference. *Id.*

On August 29, 2023, the Subchapter V Trustee Susan Seflin (the "Trustee") filed that *Subchapter V Trustee's Post Confirmation Status Report* (the "Trustee's Report"). *See* Docket No. 210. Through the Trustee's Report, the Trustee indicates that the Debtor has not paid the Trustee's Fees awarded by the Court on July 26, 2023. *See id.* at p. 2, lines 10-19. The Trustee's Report further indicates that, if the Debtor does not provide the Trustee with evidence that the Debtor is complying with its Plan obligations, then the Trustee expects that she will confer with the Office of the United States Trustee as to whether a motion to convert the case to chapter 7 is appropriate. *See id.* at lines 20-22.

On August 31, 2023, counsel for the Debtor, Kenneth Henjum ("Henjum"), filed that *Post Confirmation Status Conference: Declaration of Kenneth H.J. Henjum* (the "Henjum Declaration"). *See* Docket No. 211. Through the Henjum Declaration, Henjum attests that he "has lost communication with his client [Debtor].. [o]ver the past six weeks his emails, texts and phone calls have not been returned". *Id.* at p. 1, lines 23-28. Henjum further attests that "the telephone number does not have an active voicemail attached to it..[o]ur office sent a letter via U.S. Mail and it was returned to our office. *Id.* at lines 26-28.

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**CONT... Alcaraz Catering, Inc. Chapter 11**

Pursuant to 11 U.S.C. § 1112(b)(4)(N) "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause..." and cause includes any "material default by the debtor with respect to a confirmed plan." *See also In re Baroni*, 36 F4th 958, 967 (9th Cir. 2022). The "bankruptcy court can convert a case sua sponte under § 105(a) if cause exists to do so." *See In re Kenney G. Enterprises, LLC*, 2014 WL 4100429 \*9 (9th Cir. BAP 2014)(internal citations omitted).

The Court will issue an order to show cause why this case should not be converted to Chapter 7 or dismissed for the Debtor's material breach of Article 7 of that *Third Amended Plan of Reorganization for Small Business Under Chapter 11*.

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| <b>Party Information</b> |
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**Debtor(s):**

Alcaraz Catering, Inc.

Represented By  
Kenneth H J Henjum  
William C Beall

**Trustee(s):**

Susan K Seflin (TR)

Pro Se

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**9:23-10061 South Bay Property Homes LLC**

**Chapter 11**

**#25.00** Hearing  
RE: [67] Motion RE: Objection to Claim Number 5 by Claimant Lewis Landau.

Docket 67

**\*\*\* VACATED \*\*\* REASON: Continued by Stipulation dated 8/30/23 to  
new hearing date of 9/26/23 at 2:00pm.**

**Tentative Ruling:**

- NONE LISTED -

|                          |
|--------------------------|
| <b>Party Information</b> |
|--------------------------|

**Debtor(s):**

South Bay Property Homes LLC

Represented By  
Leslie A Cohen

**Movant(s):**

South Bay Property Homes LLC

Represented By  
Leslie A Cohen

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**9:23-10454 Global Premier Regency Palms Palmdale, LP**

**Chapter 11**

**#26.00** CONT'D Hearing  
RE: [23] Application to Employ Winthrop Golubow Hollander, LLP as General  
Insolvency Counsel Application Of Debtor And Debtor-in- Possession For  
Authority To Employ Winthrop Golubow Hollander, LLP As Its General  
Insolvency Counsel; Memorandum Of Points And Authorities; And Declarations  
Of Christine Hanna And Garrick A. Hollander In Support Thereof

FR. 8-22-23

Docket 23

**Tentative Ruling:**

**September 12, 2023**

**Appearances waived.**

At the prior hearing on the Application, the Court required that a status report be filed by the Office of the United States Trustee regarding the Office's position on the Application. The Court locates no such status report on its Docket as of September 5, 2023. The Court continues the hearing on the Application to September 26, 2023, at 2:00 p.m., and requires that the Office of the United States Trustee file a status report regarding the Office's position on the Application on or before September 14, 2023.

**August 22, 2023**

**Appearances required.**

*Background*

On June 2, 2023 (the "Petition Date"), Global Premier Regency Palms Palmdale, LP (the "Debtor") filed a voluntary petition for relief under Chapter 11 of Title 11 of the U.S. Code (this "Case"). See Docket No. 1.

On June 28, 2023, the Debtor filed that *Application of Debtor and Debtor-In-Possession for Authority to Employ Winthrop Golubow Hollander, LLP as its General*



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**Chapter 11**

*Insolvency Counsel* (the "Application"), seeking to employ Winthrop Golubow Hollander, LLP (the "Firm") as its general insolvency counsel, effective as of the Petition Date, pursuant to 11 U.S.C. § 327(a). *See* Docket No. 23.

The Application provides that "[t]he Firm received a retainer of \$48,000.00, which was funded by LK Asset Advisors, LLC. In addition, LK Asset Advisors, LLC funded \$2,000 to the Firm to cover costs, including the filing fee for the chapter 11 petition." *See id.* at pp. 5-6. The Application further provides that "LK Assets Advisors, LLC provides workout advisory services, and is interest in arranging financing and otherwise assisting the Debtor in its reorganization," and, "[a]s of the Petition Date, the Firm hold a retainer of approximately \$27,000 []. *See id.* at p. 6, lines 1-4.

On July 27, 2023, the Court entered that *Order Setting Application of Global Premier Regency Palms Palmdale, LP to Employ Winthrop Golubow Hollander, LLP as General Insolvency Counsel for Hearing* (the "Order"). *See* Docket No. 34. The Order provided that "[a]t the hearing the Court will inquire about the prepetition retainer provided by LK Asset Advisors, LLC." *See id.* at p. 2, lines 3-5.

On August 9, 2023, the Debtor filed that *Supplemental Disclosure Regarding Retainer Payment from LK Advisors in Relation to the Application of Debtor and Debtor-In-Possession for Authority to Employ Winthrop Golubow Hollander LLP as Its General Insolvency Counsel* (the "Supplemental Disclosure"). *See* Docket No. 39. In the Supplemental Disclosure, Mr. Hollander of the Firm attests that "[p]rior to the commencement of [this Case], it was anticipated that LK Advisors was going to help the Debtor obtain debtor in possession financing, serve as Chief Restructuring Officer for the Debtor, and provide approximately \$1.5 million of equity into the Debtor, all in exchange for a majority interest in, and control over, the Debtor." *Id.*, p. 2, ¶ 4. Mr. Hollander further attests that "[i]n addition to, and as a part of those discussions, LK Advisors agreed to pay to the Firm \$2,000 for expenses, and \$48,000 as a retainer." *Id.* Lastly, Mr. Hollander attests that "LK Advisors holds a claim against the Debtor for \$50,000 as a result of this payment." *Id.*

On August 15, 2023, the Office of the United States Trustee filed that *Objection of the United States Trustee to Employment Application* (the "OUST Objection"). *See* Docket No. 40. The OUST Objection provides that the facts as provided in the

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Application "[t]aken together, [] would have prompted [the OUST] to object to [the Application] on several grounds, including the fact that the Applicant would not be considered disinterested as required under 11 U.S.C. § 327(a)." *Id.* at p. 2, lines 8-10. The OUST seeks more information about the connections of LK Asset Advisors, LLC ("LKA") to the Debtor and its role moving forward, "including whether it will seek Court approval to return the monies that were advanced." *Id.* at lines 15-17.

LKA is not listed on the *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders*. See Docket No. 20. LKA has not filed a proof of claim in this Case. LKA is not listed as a secured creditors in the Debtor's *Schedule D* or as an unsecured priority or non-priority creditors in the Debtor's *Schedule E/F*. See *id.* LKA is also not listed in the *Amended Verification of Master Mailing List of Creditors*. See *id.* The *Disclosure of Compensation of Attorney for Debtor(s)* does, however, disclose that the source of the Firm's pre-petition retainer was LKA. See *id.* The Court cannot be certain whether LKA is an insider of the Debtor, whether the Firm is liable to LKA for the return of the Retainer alongside the Debtor, and what the Firm's connections to LKA are.

*Analysis*

*11 U.S.C. §§ 327(a) and 328(a)*

Pursuant to 11 U.S.C. § 327(a), "the trustee, with the court's approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. § 327(a); *see also* 11 U.S.C. § 1107(a) (granting the debtor-in-possession full authority as representative of the estate typical of a trustee). The purpose of section 327 is "to assure that a professional employed in the case will devote undivided loyalty to the client." *In re Wheatfield Business Park LLC*, 286 B.R. 412, 417-18 (Bankr. C.D. Cal. 2002). Pursuant to 11 U.S.C. § 328(a), "[t]he trustee . . . , with the court's approval, may employ or authorize the employment of a professional person under section 327 . . . of this title . . . on any reasonable terms and conditions of employment . . . ." 11 U.S.C. § 328(a).

"As for the payment of a retainer by a third party, the majority of courts do not find that it is a per se rule for disqualification or to deem the professional not

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disinterested." *In re EZ Links Golf, LLC*, 317 B.R. 858, 863 (Bankr. D. Colo. 2004). Some courts have found that "proposed counsel's acceptance of payment of the pre-petition retainer from a third party [to] necessarily present[] a conflict of interest '...in that counsel is serving two masters—the one who paid counsel and the one counsel is paid to represent.'" *In re Lotus Properties LP*, 200 B.R. 388, 3914 (Bankr. C.D. Cal. 1996)(citing *In re Hathaway Ranch P'ship*, 116 B.R. 208 (Bankr. C.D. Cal. 1990). Other courts have adopted a less restrictive approach for third party retainers, wherein a five-part test is used to analyze whether proposed counsel maintains an adverse interest to the estate that prohibits employment by the estate. *See In re Kelton*, 109 B.R. 641 (Bankr. D. Vt. 1989). The *Kelton* elements are as follows: "(1) the arrangement must be fully disclosed to the debtor/client and the third party payor/insider; (2) the debtor must expressly consent to the arrangement; (3) the third party payor/insider must retain independent legal counsel and must understand that the attorney's duty of undivided loyalty is owed exclusively to the debtor/client; (4) the factual and legal relationship between the third party payor/insider, the debtor, the respective attorneys, and their contractual arrangement concerning the fees, must be fully disclosed to the Court at the outset of the debtor's bankruptcy representation; (5) the debtor's attorney/applicant must demonstrate and represent to the Court's satisfaction the absence of facts which would otherwise create non-disinterestedness, actual conflict, or impermissible potential for a conflict of interest." *Id.* at 658; *see also In re Lotus Properties, LP*, 200 B.R. at 392-393.

In the instant case, the third-party retainer was paid by a third party, LKA. LKA was not listed as a creditor of the Debtor in the Debtor's schedules. LKA is also nowhere disclosed as an insider. LKA has not filed a proof of claim or appeared in this Case. The Application was not served on LKA. The Court agrees with the OUST. The Application lacks sufficient information for this Court to conclude that the Firm is disinterested, including the lack of enough facts for the Court to analyze the first three (3) *Kelton* factors. That *Declaration of Christine Hanna* provides that the "Debtor approves the compensation arrangements for the Firm," and had knowledge of that the Retainer was funded by [LKA]. *See* Docket No. 23, *Declaration of Christine Hanna*, pp. 15-16, ¶¶ 6, 9. The Court has been presented no evidence that the terms of the arrangement have been fully disclosed to LKA. As noted, the Notice was not served upon LKA. *See* Docket No. 24, *Proof of Service of Document*. Again, the Debtor "approves the compensation arrangements for the Firm, including the proposed

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monthly payment procedures," although the Debtor did not expressly consent to the subsidizing of the Retainer by LKA. *See* Docket No. 23, *Declaration of Christine Hanna*, p. 16, ¶ 9. There has been no showing that LKA engaged independent counsel to discuss the duties of loyalty of the Firm in its representation of the Debtor in this Case. Furthermore, the complete factual and legal relationship between LKA, the Debtor, their respective attorneys, and their contractual arrangement concerning the Retainer has not been fully disclosed in filings with this Court.

On the record confronting it, the Court is inclined to deny the Application. The Court at the hearing will hear from the Debtor and/or the Firm, but also, and perhaps as important, the OUST.

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| <b>Party Information</b> |
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**Debtor(s):**

Global Premier Regency Palms

Represented By  
Garrick A Hollander  
Matthew J Stockl

**Movant(s):**

Global Premier Regency Palms

Represented By  
Garrick A Hollander  
Matthew J Stockl

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**9:23-10607 Beacon Coffee Company, Inc.**

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**#27.00** HearingRE: [36] Motion for Setting Property Value with proof of service

Docket 36

**Tentative Ruling:**

**September 12, 2023**

**Appearances required. The Motion is denied without prejudice. The Debtor is to upload a conforming order within 7 days. The Court will inquire with the Debtor as to whether it has used cash collateral in this Case, and, if so, whether that use has been authorized by the affected secured creditors.**

On August 16, 2023, Beacon Coffee Company, Inc. (the "Debtor") filed that *Motion for Order Determining Value of Collateral* (the "Motion"). See Docket No. 36. Through the Motion, the Debtor seeks to determine the secured claims against certain of its personal property pursuant to 11 U.S.C. § 506(a) for the purposes of plan confirmation. See *id.* at pp. 3-4.

*Notice*

The Debtor provided notice of the Motion to all secured creditors affected by the Motion by first class mail on August 16, 2023. See *id.* at *Proof of Service of Document*. Pursuant to this Court's Local Rule 9013-1(f)(1), "each interested party opposing or responding to the motion must file and serve the response [] on the moving party and the United States trustee not later than 14 days before the date designated for hearing." Pursuant to this Court's Local Rule 9013-1(h), "if a party does not timely file and serve documents, the court may deem this to be consent to the granting or denial of the motion, as they case may be." No response has been filed to the Motion. The Court therefore takes the default of all parties served with the Motion.

*Analysis*

Pursuant to 11 U.S.C. § 506(a)(1), "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest [] is a secured claim to the extent of the

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value of such creditor's interest in the estate's interest in such property [] and is an unsecured claim to the extent that the value of such creditor's interest [] is less than the amount of such allowed claim." In the chapter 11 context, courts have determined the proper date of the valuation of property to be at or near the date of plan confirmation for purposes of 11 U.S.C. § 506(a)(1). *See In re Abdelgadir*, 455 B.R. 896, 902 (9th Cir. BAP 2011). Owners of a business may be competent to provide their opinion as to the value of the business' property. *See In re Kim*, 205 B.R. 238, 244 (9th Cir. BAP 1997)(*reversed on other grounds*)(citing *Robinson v. Watts Detective Agency*, 685 F.2d 729, 739 (1st Cir. 1982)). "Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C. § 506(a)(1). "If the debtor retains rather than surrenders the collateral [] then '§506(a) directs application of the replacement-value standard.'" *In re Murray Metallurgical Holdings, LLC*, 618 B.R. 220, 236 (Bankr. S.D. Oh. 2020)(citing *Rash*, 520 U.S. 953, 956 (1997)).

Pursuant to Fed. R. Bankr. P. 3012(c), "[a] request to determine the amount of a secured claim of a governmental unit may be made only by motion or in a claim objection after the governmental unit files a proof of claim or after the time for filing one under Rule 3002(c)(1) has expired." The deadline in this case for governmental units to file a proof of claim is January 22, 2024. *See* Docket No. 18. The U.S. Small Business Administration filed a proof of claim in this matter. *See* Claim No. 1.

The principal of the Debtor, John Wheir, values the property that is the subject of the Motion (i.e., the property listed on p. 4 of 13 and "raw materials") at \$31,913. *See* Docket No. 36, p. 5. At least as to the property that does not consist of raw materials, the valuation appears to be based on the "Liquidation" value of the property. *See* Docket No. 1, *Schedule A/B*, Part 8; *compare to* Docket No. 36, p. 4 of 13. As the purpose for the valuation of the property in the Motion is treatment of secured claims under a chapter 11 plan, the liquidation value is not the appropriate value of the property for purposes of 11 U.S.C. § 506(a)(1), and so the Motion is denied for lack of application of an appropriate valuation standard for the collateral.

*Use of Cash Collateral*

The Court also notes here that Square Financial Services, Inc., Economic

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Development Collaborative, and the U.S. Small Business Administration maintained liens on the Debtor's receivables, accounts and deposit accounts as of the petition date. *See* Docket No. 36, *Exhibit A*. On the petition date, the Debtor had cash of \$420, \$1,714.22 in a bank account, and receivables of \$2,064.17. *See* Docket No. 1, *Schedule A/B*, Parts 1 and 3. Pursuant to 11 U.S.C. § 363(c)(2), "[t]he trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless (A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section." The Court will inquire with the Debtor as to whether it has obtained consent to use its secured creditors' cash collateral in this Case, if it has in-fact used their cash collateral.

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| <b>Party Information</b> |
|--------------------------|

**Debtor(s):**

Beacon Coffee Company, Inc.

Represented By  
William C Beall  
Carissa N Horowitz

**Movant(s):**

Beacon Coffee Company, Inc.

Represented By  
William C Beall  
Carissa N Horowitz

**Trustee(s):**

Mark M Sharf (TR)

Pro Se